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WASHINGTON REPORTS

VOL. 80

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

JUNE 3, 1914—JULY 30, 1914

ARTHUR REMINGTON
REPORTER

SEATTLE AND SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1914

OFFICIAL REPORT

Published Pursuant to Laws of Washington, 1905, page 330
Under the personal supervision of the Reporter

FEB 11 1915

PRINTED, ELECTROTYPED AND BOUND
BY
FRANK M. LAMBORN, PUBLIC PRINTER

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ERRATA

ERRORS NOTED IN PREVIOUS VOLUMES

Volume 67

Page 176, bottom of page, for 120 Pac. read 121 Pac.

Volume 70

Page 95, 4th syllabus, line 4, for did not close read closed

Page 676, bottom of page, for 126 Pac. read 127 Pac.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 11985. *En Banc*. June 3, 1914.]

OLLAR-ROBINSON COMPANY *et al.*, Respondents, v.
J. F. O'NEILL *et al.*, Appellants.¹

APPEAL—RECORD—ABSTRACTS—NECESSITY. The provision of 3 Rem. & Bal. Code, § 1730-1, requiring the appellant, at or before the time when he is required by rule or statute to serve his opening brief, to cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he deems necessary to the hearing, is a mandatory step in the appeal; and if the abstract is not served within the time limited, the appeal must be dismissed (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 6, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contracts. Appeal dismissed.

Jno. Mills Day and *M. E. Brewer*, for appellants.

John W. Roberts and *George L. Spirk*, for respondents.

ELLIS, J.—The respondents have moved to dismiss this appeal for the reason that the appellants failed to prepare and serve upon the respondents or counsel for the respondents any abstract of the record at or before the time of serving their opening brief, as provided by Laws of 1913, ch. 116,

¹Reported in 141 Pac. 194.

p. 349, § 1 (3 Rem. & Bal. Code, § 1730-1). That section reads as follows:

"The appellant shall, at or before the time when he is required by rule or statute to serve his opening brief, cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error. Said abstract, in so far as it sets out testimony, shall be condensed into narrative form, without the questions and answers except when necessary for the discussion of evidence. It shall be prepared without notice or hearing thereon, and if the opposite party be not satisfied with it, he may cause to be typewritten and served, without notice, either before or at the time of serving his answering brief, so much of the record and statements of facts, condensed as above, as he for his part may deem proper for the correction or supplementing of his opponent's abstract. Each party shall pay the cost of typewriting his abstract, and the prevailing party shall be entitled to recover his disbursements therefor as other costs. For any abuse in typewriting excessive or unnecessary matter in the abstract, the supreme court, without regard to which party may prevail, may impose the costs thereof upon the party committing such abuse. The supreme court shall also provide by rule the form of abstracts, the number thereof to be typewritten, and for other particulars thereof, including the time and place of filing the same."

The action was tried to a jury and a verdict returned in favor of the respondents on April 8, 1913. On April 11, 1913, a motion for a new trial was filed. On November 6, 1913, the motion for a new trial was denied. On the same day, judgment was entered in favor of the respondents. The notice of appeal was served and filed on December 26, 1913. The statement of facts was settled and certified on the 20th day of February, 1914. The appellants' opening brief was served March 18, 1914. By a supplemental transcript, sent up for the purposes of this motion, it appears that the appellants' abstract of record was served upon the respond-

June 1914]

Opinion Per ELLIS, J.

ents' attorney on April 14, 1914, almost a month after the service of the appellants' opening brief.

The respondent points out that, by the statute, the abstract is made the primary and essential thing to which this court must refer in considering the appeal, the record and the statement of facts being used only to verify the correctness of the abstract in case of dispute. It is argued that, therefore, the abstract should be stricken and the appeal dismissed in any case in which the statement of facts would be stricken and the appeal dismissed; e. g., for failure to file and serve the proposed statement of facts within thirty days (or by a valid extension on notice within ninety days) from the denial of the motion for a new trial. It is true that it is now the settled practice of this court that, under such circumstances, the statement of facts will be stricken, and where questions for review are questions of fact, the appeal will be dismissed. The statute, Rem. & Bal. Code, § 393 (P. C. 81 § 693), offers no alternative to such a course. That section expressly declares that no extension shall enlarge the time of thirty days for filing and service of the proposed statement of facts "for more than sixty days additional in all." *Howard v. Bussell Land Co.*, 74 Wash. 331, 133 Pac. 596; *Michaelson v. Overmeyer*, 77 Wash. 110, 137 Pac. 332.

On the other hand, it was urged in argument that, since the act of 1913 requires that the abstract shall be served at or before the time when the appellant is required to serve his opening brief, and since the service is only to enable the respondent to refer to the abstract in the preparation of his answering brief, and since this court has held that a motion to dismiss for failure to file briefs in time will be determined by the status of the case at the time the motion is heard (*Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752), therefore, the motion to dismiss for failure to serve the abstract in time should also be determined by the status of the case when the motion is heard. This states the appellants' position at least as strongly as it was presented in the oral argument, and much more definitely than it is presented in their brief.

Before we would be justified in adopting either of these rules by reason of any supposed analogy, we must find that the analogy actually exists. A mere similarity of the use of the abstract either to that of the statement of facts which it is supposed to simplify, or to that of the appellant's brief with which it is supposed to be served, will not warrant the adoption of either rule. It is incumbent upon us to adopt no rule not reasonably calculated to insure the availability of the abstract at the time and for all of the purposes for which the legislature intended that the abstract should be used, to the end that delay in disposing of cases in this court on appeal may be obviated. To us, it seems that neither of these rules is justified by the purposes for which the abstract is required. Obviously, the primary purpose of the abstract is, as the respondent claims, for the use of this court in arriving at its decision on the merits of the appeal without the waste of time necessary to sift the material from the immaterial in the statement of facts, often long, or in the transcript record, often voluminous. The plain purpose of the abstract is to aid this court in a more speedy disposition of each case, to the end that there be no unnecessary delay in the administration of justice in any case. As ancillary to this purpose, it is, of course, necessary that the abstract be used and referred to by the appellant in the preparation of his own opening brief, and also by the respondent in the preparation of his answering brief. If not so used and appropriately referred to in both briefs, the abstract would be of little use to this court, and would not meet its primary purpose. These are unquestionably the considerations which impelled the legislature to provide, in mandatory terms, that the appellant *shall*, at or before the time when he is required by rule or statute to serve his opening brief, serve also the abstract. Both the language of the act and the purpose of the abstract make it necessary that this provision for service be held mandatory. There may be

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honest differences of opinion as to the wisdom or expediency of the statute in requiring any abstract, but there can be none as to its purpose or meaning.

In this connection, it is significant that the legislature has not only used mandatory terms in providing the time of service, but has withheld from this court any power to modify these terms by rule. It has given this court a discretionary power to supplement the statute by rule, but only in expressly specified particulars. The court is permitted by rule to provide for the form, number and other particulars of the abstract, including the time and place of *filing*. There is delegated to us no power or discretion to make any rule as to the time of service. For this court to modify the plain and direct terms of the statute fixing the time of service, either by formal rule or by loose construction, would be a plain usurpation of a power which has been, by necessary implication, withheld in the act itself. It would be a judicial amendment; a wanton invasion of the province of the legislature.

The time of service fixed by the act itself is the only time which will give effect to the purpose of the abstract. If not served either before or at the time of the service of the appellant's brief, it would operate not as an aid to the speedy disposition of appeals, but merely as another fruitful source of delay, since no answering brief which could be of any aid to this court in connection with the abstract can be prepared until the abstract has been served upon the respondent. It is no hardship to require the service not later than the service of the brief, since to be of any use, the abstract must be prepared in advance of the preparation of the appellant's brief and appropriately referred to in the appellant's brief. The time and place of *filing* are things very properly left to this court to provide for by rule, since the filing would be in time to meet every useful purpose if made at any time before the actual hearing in this court. The time of *service*, however, is so obviously and inseparably connected with any useful purpose of the abstract, and it is so demonstrably certain

that, if it be extended beyond the service of the opening brief, it will delay the preparation of the case for hearing in this court, that the legislature has wisely fixed the time of service of the opening brief as the time beyond which the service of the abstract shall not extend.

It is thus manifest that we cannot adopt the rule contended for by the respondent to the effect that, by analogy to the proposed statement of facts, the abstract can in no event be served later than ninety days from the date of final judgment or denial of the motion for a new trial, since the purpose of the service in the two cases is not the same. The analogy is by no means complete. Such a rule would be unnecessarily narrow and arbitrary as applied to abstracts which would be useless to the respondent until the appellant's brief is served, and the time of service of that brief may be extended beyond ninety days by order of the superior court for good cause or by stipulation of the parties. Rem. & Bal. Code, § 1730 (P. C. 81 § 1213). It is significant in this connection that the power to extend the time for serving the abstract is withheld. It can only be extended by securing the extension of time for serving the opening brief.

It is equally manifest that the other rule contended for, to the effect that, by analogy to the rule adopted for the filing of briefs, the motion to dismiss should be determined by the status of the case when the motion is brought on for hearing, is inapplicable. Again the analogy is not present. In the very case in which the rule was definitely announced, *Spedden v. Sykes*, *supra*, the appellant, prior to the hearing of the motion to dismiss, had secured an extension of time from the superior court for the filing of his briefs under the direct authority of the statute, Rem. & Bal. Code, § 1730 (P. C. 81 § 1213). The briefs in that case so stated. The only question discussed in the briefs was whether the order of extension could be secured after ninety days. It was that status of the case—a status created pursuant to direct statutory authority—which was there held as determinative of the mo-

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tion to dismiss for failure to file the briefs in time. No such excusatory status can exist as to failure to serve the abstract at or before the service of the opening brief. There can be no extension as to the abstract without an extension of time for filing the opening brief. The statute relating to the abstract suggests no other means for an extension of time for serving the abstract.

While this court is loath to dismiss any appeal on purely technical grounds, the rule prescribed by statute cannot be held a merely technical rule, since, as we have seen, it is the only rule which can affectuate the plain purpose and the only useful purpose of an abstract. The law is no more technical than any other law which makes for reasonable certainty. For a court which has, for twenty years, adhered to the rule that a statement of facts would be stricken when it is served before filing merely because the statute says the proposed statement shall be "filed and served" to now balk the plain purpose and mandate of the legislature by permitting the service of an abstract after the time prescribed for the service of the brief, on the ground that the rule prescribed by the legislature may be thought technical, would be capricious. Moreover, it would defeat the legislative purpose of the abstract as an aid in hastening the disposition of the appeal. It would sacrifice every legislative purpose to an unwarranted judicial timidity. It would emasculate the statute and invite a new and fruitful source of excuse for pure delay. An imposition of terms would serve no purpose, since an appellant bent on delay might willingly meet the terms in order to secure the delay. We can only enforce the statute so as to meet its plain purpose by holding the service of the abstract before or at the time of the service of the opening brief a mandatory step in the prosecution of an appeal which we have no power either to waive or excuse.

We find no merit in the appellants' claim that it does not appear from the record that the abstract was not served with the brief. The fact does appear by affidavit and is not def-

initely controverted. We can hardly conceive of a case in which such a negative would otherwise appear. It is the duty of an appellant to make the affirmative appear.

The appellants cite the provision of section 1 of rule 7 (71 Wash., p. XLVII) of this court which permits the respondent to prepare and recover costs of a supplemental abstract when made necessary by reason of the fact that the appellant's abstract does not fairly state the record or the evidence. They argue that the spirit of this rule negatives the right of a respondent to a dismissal, even if the appellant fail to serve any abstract or to file one, and that respondent's only remedy would be to supply the defect by preparing an abstract himself. The rule, as we have seen, has nothing to do with service of the abstract. That matter was never referred by the legislature to this court to be provided for or regulated by rule. We were never authorized to make a rule touching service, and if we had made one differing in any material particular from that set out in the statute itself, the rule would be void. Neither the spirit of the statute nor the rule above referred to is capable of any such construction as that contended for. The rule was intended to do no more than to insure the presentation to this court of a fair abstract. Such a construction as that contended for so revolts the natural sense of fairness that we cannot assume that either the legislature, in providing for a supplemental abstract, or this court in providing for the taxing of costs in such a case, ever intended that it should have such an effect.

Nor do we find any merit in the claim that, because the rule of this court allows an appellant to supplement his original abstract without leave at any time before the cause is assigned for argument, excuses the failure to serve an original abstract, prepared in good faith, in compliance with the statute and the rules. The argument that this would permit the filing as an original of the most meager and defective abstract cannot be entertained. The statute was never intended to be treated as a joke. To give the rule in question the effect

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claimed would render the statute nugatory and the abstract a useless incumbrance to the record, since the things material to the appeal could not be pointed out in the briefs by a reference to the supplemental abstract.

As showing the purpose of the abstract and the importance which other courts attach to the enforcement of statutes and even rules governing its use, we may be pardoned for a few quotations:

"We have no right to waive the enforcement of these rules as a matter of favor in any case without granting the same indulgence in other cases, and thus effectually suspending the operation of the rules altogether." *Spain v. Thomas*, 49 Ill. App. 249.

"But the legislature of this state has enacted a statute which as interpreted by the supreme court of this state, requires parties appealing to print an abstract of the record, and we are not at liberty to ignore this statute any more than we are any other statutory duty that the legislature had prescribed for our guidance." *Grubbs v. Watkins*, 142 Mo. App. 11, 125 S. W. 214.

"It is with reluctance that we summarily dispose of cases; but when the motion is made by the opposite party, and not only our rules but the statute as well requires that the appellant shall file 'printed abstracts of the entire record,' we have no discretion, but are required to dismiss the appeal. The law as to abstracts is as binding as the law of contracts and must be impartially enforced as a rule of action governing appellate courts." *Webster v. Berry*, 140 Mo. App. 385, 124 S. W. 1078.

"There is no rule of more importance than the one requiring a party to furnish a complete abstract or abridgment of the record, and its strict enforcement is absolutely necessary to enable this court to examine the cases submitted and file opinions therein within any reasonable time after the same have been submitted. Under the rules of this court plaintiffs in error have presented no question which can be determined without a laborious examination of the record. This we will not do. Our time belongs to the consideration of

cases wherein the parties have presented them in accordance with our rules." *Inman v. Miller*, 234 Ill. 356, 84 N. E. 935. See, also, *Thust v. Strong*, 7 N. D. 565, 75 N. W. 922; *Spencer v. McMaster*, 3 Wyo. 105, 3 Pac. 798; *Whiting v. Big River Lead Co.*, 195 Mo. 509, 92 S. W. 883; *Files v. Tebbs*, 101 Ark. 207, 142 S. W. 159; *Ballard v. Cheney*, 19 Neb. 58, 26 N. W. 587; *Ph Zang Brewing Co. v. Howlett*, 6 Colo. App. 558, 42 Pac. 186.

The rule of service prescribed by the statute is so plain, so easy to follow, so natural to the relation between the briefs and the abstract, and, above all, so essential to any useful purpose which can be conceived of the abstract, that we must enforce it as a mandatory step in the appeal or judicially repeal the law.

The appeal is dismissed.

CROW, C. J., MAIN, MORRIS, PARKER, CHADWICK, MOUNT, and GOSE, JJ., concur.

FULLERTON, J. (dissenting).—I am unable to concur in the foregoing opinion. In my judgment, it places an unnecessary and an unwarranted construction upon the statute relating to abstracts on appeal. It holds the statute mandatory, and in a sense jurisdictional. This means that any material deviation by an appellant from its prescribed terms will work a denial of his right to have his cause heard in this court upon its merits. Since practitioners are prone to err in matters of practice, it requires no prescience to foretell that, if this construction is to be adhered to, the statute will prove a fruitful source for the dismissal of appeals.

I agree with much that is said concerning the purposes of the statute, but I cannot agree with the conclusion that "we can only enforce the statute so as to meet its plain purpose by holding the service of the abstract before or at the time of the service of the opening brief a mandatory step in the prosecution of an appeal which we have no power either to waive or excuse." In the first place, the statute does not so

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require, and in the second place it is not, in my opinion, either mandatory or jurisdictional. It is a practice act, an act regulating the procedure after jurisdiction has been acquired, and should be construed as an act to facilitate the hearing of the appeal upon its merits, not as a means of denying the right to such a hearing. I am aware that it is said that the words of the act are mandatory in form. But I think this not conclusive, even if the words bear that construction. A statute so worded may be given a directory meaning when its evident purpose and intent so requires. But this statute contains evidence in itself that it was intended to be directory, rather than mandatory. It contains a section not noticed by the majority. This section provides that nothing in this act contained shall alter in any respect the existing manner of settling and certifying bills of exceptions and statements of fact, and that such bills and statements shall be transferred to this court to be referred to in any controversy concerning the accuracy of the abstract, as well as for reference to exhibits, "and for such other uses as the supreme court may find proper in consideration of all matters on appeal." This last clause, in my judgment, permits this court to consider appeals upon their merits, if it so desires, regardless of the fact whether or not an abstract has been filed or served. This being true, it follows, as of course, that no mandatory or jurisdictional requirement of the statute is violated by failing to file and serve an abstract within the time prescribed therein.

The question is, in my opinion, one of expediency: Will the court, because of a violation of a rule of practice, deny to a litigant the right to be heard upon the merits of his appeal? Looking at the question in this light, it seems to me that the court ought to hesitate long before it adopts a rule so harsh and extreme. It is contrary to the spirit of the practice acts. For the past one hundred years, legislation has been directed towards abolishing technicalities in court procedure,

and to the securing of the hearing of causes upon their merits. Our own code furnishes abundant examples of this fact. By it, all common law forms are abolished and, in lieu thereof, it is enacted that every pleading shall contain a plain and concise statement of the facts constituting the cause of action or the grounds of defense. An entire chapter therein is devoted to the mistakes and amendments. The court is required, in every stage of an action, to disregard any error or defect that does not affect the substantial rights of the adverse party. Even judgments may be relieved against when entered through mistake, inadvertence, surprise or excusable neglect. And the legislature has not confined its admonitions altogether to courts of the first instance. This court, in the statute relating to appeals, has been admonished to allow all amendments in matters of form, curative of defects in the proceedings, to the end that substantial justice be secured to the parties, and has been directed not to dismiss an appeal for defects and mistakes not jurisdictional, if the appellant shall, upon order of the court, perfect the appeal.

Again, it is said that the rule adopted by the majority is no more harsh than the rule adopted by this court with reference to the statute relating to the filing and serving of statements of facts. But I think this rule not sound, and that it should not be followed in a case to which it is strictly applicable, much less in a case where it is only analogously so. The rule referred to was first announced in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241. It was there held, under a statute which merely provided that a proposed statement of fact should be filed and served, that a statement must be stricken if it was served before filing. With all due respect to the judges pronouncing that decision, and to my prior and present associates who have adhered to it, I cannot think the rule has any foundation in reason. Manifestly, the order in which the acts were named in the statute was an accidental circumstance. The purpose was to require both the filing and serving of the proposed statement, and I ven-

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ture to assert that it was never dreamed by the draughtsman of the act or the legislators who voted for its passage that the order in which the acts were to be performed was material. The precedents cited from other jurisdictions I shall not comment upon further than to say that I do not find that the liberal rules enjoined by our code prevail in such jurisdictions.

As appears in the majority opinion, the appellant in the case at bar supplied the abstract before the cause was called for hearing. This, in my judgment, evidenced his good faith and should prevent a dismissal of his appeal for want of an abstract. If the briefs do not properly refer to the abstract, and this is a material defect, opportunity should be given for a correction of the briefs. This, it is true, would cause some delay, but time is not the principal consideration in the hearing of an appealed cause. A more important consideration is that the cause be heard upon its merits, and to this end the rules of practice should be directed.

The motion to dismiss should be denied.

[No. 11536. Department Two. June 6, 1914.]

THE STATE OF WASHINGTON, *on the Relation of E. B. Adams,*
Respondent, v. HARRY GRIMES, as Justice of the
*Peace etc., Appellant.*¹

JUSTICES OF THE PEACE—PLEADINGS—AMENDMENTS. After change of venue to another justice, such justice has power to allow an amendment of the complaint in any particular, allowing a reasonable time to meet the same.

SAME—JURY TRIAL—DISCHARGE OF JURY—FAILURE TO AGREE. Although not provided for by statute, it is within the general powers of a justice of the peace to discharge a jury in a criminal case, without a loss of jurisdiction, where the jury is unable to agree after deliberation for a reasonable length of time.

SAME—DELIBERATION BY JURY—REASONABLE TIME. Deliberation by a jury in justice court for one hour is a reasonable time, authorizing its discharge, where the jury announced its inability to agree, and the justice upon inquiry finds there is no probability that they will agree.

SAME—TRIAL—CONTINUANCE—JURISDICTION. A justice does not lose jurisdiction by failing to adjourn a criminal trial to a day certain, upon discharging a jury that was unable to agree upon a verdict; and may bring the defendant before him on a second warrant.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered February 3, 1912, vacating proceedings before a justice of the peace in a criminal prosecution, on the hearing upon a writ of certiorari. Reversed.

John Truax, for appellant.

FULLERTON, J.—This is an appeal by the state of Washington from a judgment of the superior court of Adams county, setting aside and vacating certain proceedings had before a justice of the peace in that county.

On January 26, 1912, one M. H. Quirk filed a complaint before Fred Thiel, one of the justices of the peace in and for Ritzville precinct, in Adams county, charging the relator,

¹Reported in 141 Pac. 184.

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E. B. Adams, with the crime of assault in the third degree, under § 2415 of Rem. & Bal. Code (P. C. 135 § 325). The relator was arrested on a warrant issued on the complaint and brought before the justice, whereupon he filed an affidavit for a change of venue. The change was granted by the justice to another justice of the same precinct, Harry Grimes, and the relator required to appear before such justice on January 29, 1912. On the appearance of the parties before the last named justice pursuant to the order, the prosecuting attorney representing the state discovered that the name of the person assaulted had been misspelled in the complaint, and thereupon, over the objection of the relator, filed a new complaint against him charging him with the same offense. The relator entered a plea of not guilty to the new complaint, and announced that he was ready for trial. The state thereupon demanded a jury, which was duly summoned by the justice. Both parties introduced evidence, and addressed the jury through their counsel, after which the jury retired to consider their verdict. After having deliberated upon the case for something more than an hour, the jury sent word to the justice that they were unable to agree upon a verdict. The justice thereupon called the jury before him, and, after "due and diligent inquiry," satisfied himself that the jury could not agree upon a verdict, and discharged them from further consideration of the cause. The record fails to show what order was entered in the justice's docket at the time of the discharge of the jury. The justice, however, on February 1, 1912, again called the case for trial, and was proceeding therewith, when he was served with a writ of certiorari, issued out of the superior court at the instance of the defendant, staying further proceedings until the writ could be determined. On the hearing of the writ in the superior court, after the return of the justice thereto, the proceedings before the justice were vacated and annulled, on the ground that the justice court had been divested of jurisdiction of the cause, and jurisdiction over the person of the defendant.

The record does not disclose the particular act of the justice of the peace which is thought to have divested his court of jurisdiction over the cause or the person of the defendant, nor have we been favored with an argument on behalf of the defendant. In our consideration of the case, therefore, we shall notice only those questions suggested by the record which seem to us to be debatable, and most likely to have influenced the judge of the superior court when deliberating upon his decision.

The first of these is the act of the justice of the peace in permitting a new complaint to be filed after the cause had reached him on the order for a change of venue. But clearly in doing so he acted within his powers. After the cause had been transferred to his court, he had the same power and authority over the subsequent proceedings as he would have possessed had the proceeding been originally commenced before him. He could allow a new complaint to be filed correcting the old one in any particular, even to allowing a change therein as to the offense charged against the defendant. He must, of course, give the defendant an opportunity to plead to the new complaint, and must allow him a reasonable time, if he demands it, to prepare his defense thereto, before putting him upon his trial, but the record shows that the justice complied with these requirements in the present instance. The defendant was permitted to plead to the complaint, and submitted to an order for trial without suggesting that he was unprepared for trial. There was, therefore, no irregularity or error in the proceeding in this respect, much less such an error as would be subject to review on certiorari, or that would amount to a loss of jurisdiction.

The second possible ground for a loss of jurisdiction is the action of the justice in discharging the jury after he had determined that they could not agree upon a verdict. The statute regulating the practice in justice's courts is strangely silent as to the procedure that shall be followed in a contingency of this kind, and it does, moreover, provide that the

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jury, when summoned for the trial of a criminal cause, shall not only determine the guilt or innocence of the defendant, but shall, if it finds him guilty, assess his punishment. But nevertheless we think it within the general powers of a justice of the peace to discharge a jury in a criminal cause when they fail to agree, without a loss of jurisdiction over the cause or over the person of the defendant. The calling of a jury in a justice's court to hear and determine a criminal cause pending therein is not the selection of another or new tribunal to try the cause. The jury bears the same relation to the court of the justice of the peace that it bears to the court when called in a court of general jurisdiction; it becomes, for the time being, a part of the court, and the cause still pends therein after it has performed, or failed to perform, its functions and has departed with leave of the court. If, therefore, for any legal reason, it fails to perform the function for which it is called by disagreeing on the verdict proper to be rendered, it is difficult to see on what principle it deprives the justice of jurisdiction to proceed further. The cause is still pending before the justice, undetermined; there has been a mistrial, and consequently no jeopardy, and since jurisdiction is conferred on the justice for the very purpose of finally determining the cause, it would seem that he had no other duty than to begin the trial anew and proceed to a final determination of the cause. Were the question one of jurisdiction, it would be an answer to say that the law does not so provide. But the question is not one of jurisdiction, but of procedure only; and want of a prescribed procedure does not, as a general rule, deprive a court of carrying out the purposes for which it is created. If a form of procedure is prescribed for it by the power creating it, or by the power having authority to prescribe the procedure, it must, of course, substantially follow such procedure. But when jurisdiction to do a particular thing is alone conferred on a court, the court may adopt any such reasonable and proper procedure as it finds necessary to carry such juris-

diction into effect. This principle is applicable to all courts, when acting within their jurisdiction, whether that jurisdiction be limited or general, and hence is applicable to courts presided over by the justices of the peace.

The next question is, did the court require the jury to deliberate for a sufficient length of time. Our own cases furnish authority for the principle that a trial court may discharge a jury in a criminal case, without prejudicing a further prosecution, when it appears that a reasonable time for deliberation has been allowed and a verdict has not been agreed upon and there is no probability of the jury agreeing upon a verdict. This we held in *State v. Costello*, 29 Wash. 366, 69 Pac. 1099; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121; and *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932. But the cases proceed upon the theory—and such unquestionably is the general rule—that a premature discharge of the jury, that is to say, a discharge before it becomes reasonably certain that no agreement can be reached, will prejudice the right of a further prosecution. But while the rule is undoubtedly applicable to a justice's court, we think that the conclusion that the jury is unable to agree is properly reached in a trial in a justice's court after a deliberation for a much shorter time than is permissible in a court of general jurisdiction. Aside from the fact that the issues for trial are usually more simple in the one court than in the other, the law contemplates that the proceedings shall be more summary. The crucial question, moreover, is not how long have the jury deliberated, but is rather, is there a probability of the jury reaching an agreement; and we think that, after jurors in a justice's court have deliberated for more than an hour and have announced to the justice that they are unable to agree, and the justice, after questioning them, reaches the same conclusion, it would be too much to say, as a matter of law, that their discharge was equivalent to an acquittal of the defendant.

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Syllabus.

Did the justice lose jurisdiction of the cause by failing to continue it to a day certain after the discharge of the jury? The statute does not so provide, and we see no substantial reason for so holding. He may lose jurisdiction over the person of the defendant if he lets him go without day, but the cause itself is still pending before him, and he may require the defendant to be brought before him on a second warrant.

The judgment appealed from is reversed, and the cause remanded with instructions to quash the writ of certiorari and dismiss the application therefor.

Crow, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

[No. 11592. Department Two. June 6, 1914.]

ROY SWITZER, *Respondent*, v. F. L. SHERWOOD *et al.*,
Appellants.¹

PLEADINGS—COMPLAINT—DEFINITENESS—BILL OF PARTICULARS. A complaint for injuries sustained in a collision with an automobile is sufficiently definite and certain, and not subject to a demand for a bill of particulars, where it alleges the ultimate and issuable facts, charging that the defendants negligently lost control of the automobile, and carelessly approached a street crossing without giving warning or slackening their speed, and drove the automobile out of the traveled track, and negligently permitted it to collide with the plaintiff, due to the negligent manner of operation.

APPEAL—HARMLESS ERROR—PLEADINGS—AMENDMENTS. Error in ruling on the sufficiency of the complaint is harmless where there was a full trial on the merits, as the complaint will be deemed amended to conform to the proof.

MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION—DEFENSES—FAILURE TO OBTAIN LICENSE. The operation of a motorcycle without first having obtained a license, in violation of Rem. & Bal. Code, §§ 5562-5566, does not bar an action to recover for personal injuries sustained in a collision with an automobile, as there was no causal connection between the acts.

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—CHILD AS SERVANT OF PARENTS—DRIVING AUTOMOBILE.

¹Reported in 141 Pac. 181.

A community, consisting of husband and wife, the owner of an automobile used for the pleasure of their family and the business of the community, is liable to third persons for injuries sustained through the negligent driving of a daughter, using the car with the consent of the parents, whether it was driven for pleasure or business.

APPEAL—REVIEW—VERDICT. A verdict supported by conflicting evidence is conclusive on appeal.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered March 1, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a collision with an automobile. Affirmed.

Caleb Jones, for appellants.

D. R. Glasgow, for respondent.

FULLERTON, J.—This is an appeal from a judgment of the superior court of Spokane county, entered in an action for personal injuries brought by the respondent against the appellants.

Crestline street and Buckeye avenue are public streets within the city of Spokane, crossing each other at right angles. Crestline street extends north and south from this crossing, and Buckeye avenue east and west therefrom. Along the center of Crestline street, are the double tracks of a street railway company. Neither of these streets, at the time of the accident, was graded or otherwise improved by the city, and neither used by the public for its full width; the travel on Crestline street being confined to the west side of the railway tracks, and the travel on Buckeye avenue to the south side thereof.

On the evening of August 1, 1912, the respondent was proceeding north on Crestline street, riding a motorcycle. At the same time, the appellants Lucy W. Sherwood and F. L. Sherwood were riding west on Buckeye avenue in an automobile driven by Lucy W. Sherwood. Both parties were approaching the junction of the streets. The respondent

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reached the junction slightly ahead of the appellants and crossed the traveled way in front of the automobile. As he reached a point some four or five feet beyond the course of the traveled way of Buckeye avenue he turned to the right intending to cross to the other side of the street. At that point, he was run into by the automobile, the machine having been swerved to the right of the traveled way by its driver. As a result of the collision, the respondent's leg was broken, and his body otherwise bruised, causing him painful and lasting injuries.

The appellants, at the time of their appearance in the action, moved for an order requiring the complaint to be made more definite and certain, and to require the respondent to furnish them with a bill of particulars; and on these motions being overruled, filed a general demurrer to the complaint, which was likewise overruled. The rulings on these motions and on the demurrer constitute the first of the errors assigned by the appellants. The respondent stated in his complaint the facts leading up to the injury from his own viewpoint. He alleged that, at the time of the collision, the appellants unlawfully, negligently and carelessly lost control of the automobile; that they did not drive the same over the usual traveled way, but over that portion of the street which is several feet north of the usual traveled way; that they drove the automobile recklessly and carelessly without regard to the safety of persons passing on the street in the vicinity of the accident; that they gave no warning of their approach to the street, did not slacken their speed so as to have the automobile under control, and carelessly and negligently permitted the machine to collide with the respondent; and that the conditions above referred to and the injury sustained by the respondent were due solely to the reckless, careless, negligent, and unlawful manner in which the automobile was operated. The motion asks that the respondent be required to state in what respect the appellants were negligent and careless in the operation of the automobile, specify-

ing each particular act of negligence relied upon; that he state in what respect the appellants lost control of the automobile; in what way and in what respect the appellants were careless in operating and driving it; in what way or respect they disregarded the safety of persons traveling in that vicinity; the rate of speed they were traveling and distinctly and definitely if they lost control of their automobile on account of such rate of speed; that he state definitely what the carelessness consisted of in permitting the car to leave the traveled roadway; to state definitely and certainly what conditions were referred to in the phrase, "that the conditions above referred to," used in the complaint; and to state "definitely, in what respect or way the defendants were careless in operating their automobile, in what way or respect reckless, in what way or respect unlawful." Manifestly the complaint is not faulty in these particulars. If these are requirements necessary to good pleading, the complaint, instead of being a plain and concise statement of the facts constituting the cause of action, must be a detailed statement of the evidence on which the complainant relies to prove his cause of action. But such is not the rule of the code, nor is it required by the practice. Ultimate facts alone need be pleaded, "the final and resulting facts, reached by processes of logical reasoning from the detailed or probative facts." The complaint in this instance stated the ultimate and issuable facts, and was thus sufficient.

But the question is, moreover, at this stage of the proceedings, not very material. The court tried the cause as if upon sufficient pleadings. The respondent was confined in the presentation of the case to the principal issue on his part, namely, was the collision the result of negligent conduct on the part of the appellants. The appellants were given full opportunity to meet this issue, and to show contributory negligence on the part of the respondent. The questions could not have been more fully or differently presented had the complaint contained the matters the appellants now con-

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tend it should have contained. There was, therefore, no prejudice in the rulings of the court on the pleadings, and in such cases this court is required by statute, in reviewing errors alleged to have been committed at the trial, to consider all amendments made that could have been made, and treat the issues as if they were as broad as the evidence.

It is next urged that the respondent cannot recover for the reason that he was himself, at the time of the collision, violating the statute. This contention is founded on the fact that the respondent was operating his motorcycle on the public highway without first obtaining the license required by §§ 5562 to 5566, inclusive, of Rem. & Bal. Code (P. C. §§ 1, 9). The sections cited constitute the revenue portion of the statute licensing and regulating the use and operation of motorcycles and automobiles on the public highways. Had the respondent violated some part of the regulative part of the statute, and his injury had resulted therefrom, unquestionably he could not recover, regardless of the negligence of the appellants, as long as such negligence was not wanton. But the violation of the revenue part is an offense against the state, solely, and it alone may enforce the penalties. In other words, before the violation of the statute by the person injured will constitute a defense to the negligent act of the person injuring him, there must be shown some causal connection between the act involved in the violation of the statute and the act causing the injury. Here there was no such causal connection. The injury would have happened in the same manner it did happen had the respondent theretofore paid the license fee due the state and been in possession of the statutory license.

It was shown that the automobile was owned by F. L. Sherwood and Mrs. F. L. Sherwood, as a community, and was used for the pleasure of the community and their family and in connection with the community business of selling and dealing in real estate. It is claimed that the act causing the injury was the individual tort of Lucy W. Sherwood, or at

most the tort of Lucy W. Sherwood and F. L. Sherwood, and that it was error to allow judgment to go against the community for the wrong committed. But we met and determined this question adversely to this contention in the case of *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821. In that case, the authorities relied upon by the appellants to maintain the contrary conclusion were cited and reviewed by us, and the conclusion reached that the owner of an automobile purchased for the use of his family is liable to third persons for injuries sustained through its negligent driving by any member of the family of the owner who has permission from him to drive it, whether it is driven on the immediate business of the owner or for the pleasure of the person driving it. In the case cited, the question is discussed, both from the standpoint of principle and authority, and it is unnecessary to further elaborate the argument.

Complaint is made concerning certain instructions of the court, but these we think merit no special consideration. The court's instructions were somewhat lengthy, but the rights and liabilities of the appellants were clearly defined therein, and we fail to find that the jury were in any manner misdirected.

Finally, it is said that the evidence does not justify the verdict. The appellants' evidence undoubtedly would have justified a finding in their favor, but it is equally clear that the evidence on the part of the respondent sustains the verdict rendered. This evidence we have outlined in our statement of the case, and it is unnecessary to again repeat it. There being thus discordant views as to the facts giving rise to the injury, we are bound by that view adopted by the jury.

The judgment is affirmed.

Crow, C. J., PARKER, MOUNT, and MORRIS, JJ., concur.

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[No. 11656. Department Two. June 6, 1914.]

JOHN WALDY, *Respondent*, v. PRESTON MILL COMPANY,
Appellant.¹

NEGLIGENCE—FIRES—LIABILITY—FAILURE TO SECURE PERMIT—STATUTES—APPLICATION. 3 Rem. & Bal. Code, § 5277-3, providing that no one shall burn any forest material within any county in which there is a fire warden or ranger, during specified months, without first having obtained a written permission from the warden or ranger, has no application where the fire warden sent rangers to personally superintend the burning and take charge thereof; hence the setting of a fire, pursuant to the directions of rangers in charge of the burn, does not render the party liable as for a fire set without the written permit, as provided by the statute requiring permits, it not being customary to issue permits in such cases.

NEGLIGENCE—FIRES—LIABILITY. Where forest rangers in charge of a burn arranged for the starting of a fire by defendant upon a given signal, and defendant mistook or misunderstood the signal and started a fire too soon, thereby destroying plaintiff's property, the defendant is not liable unless it failed to act as a reasonably prudent person would have acted in the exercise of reasonable care in starting the fire.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered June 12, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages through the destruction of property by fire. Reversed.

Corwin S. Shank and *Horatio C. Belt*, for appellant.

Vanderveer & Cummings, for respondent.

FULLETON, J.—The Preston Mill Company and the Northwest Lumber Company owned adjoining timber lands, situated in King county, which they were engaged in logging. Near their boundary line, was a tract of logged off lands, which, on account of the forest material or debris left thereon, was dangerous in the dry season to the timber lands because of the fire risk. Sometime in the spring of 1912, a

¹Reported in 141 Pac. 192.

representative of the Northwest Lumber Company met a representative of the Preston Mill Company and suggested the burning of the logged off lands before the dry season, and finding the representative of the latter company agreeable thereto, undertook to make the necessary arrangement with the fire warden for that purpose. Later on the attention of the fire warden was called to the matter, and on June 1, 1912, he sent two rangers to the place to superintend the burning. The rangers arrived at the tract desired to be burned on the morning of the day mentioned, looked the same over, and determined upon a line of action. The respondent, John Waldy, then had a railway construction camp near the side of the tract it was desired to burn, he being then engaged in constructing a logging road for the Northwest Lumber Company. The rangers, as a preparation for the main fire, required a clearing to be made in front of Waldy's camp, and a fire break to be constructed in front of certain standing timber belonging to the Northwest Lumber Company. The rangers then went to a representative of the Northwest Lumber Company and told him of the preparations necessary to be made, and the representative at once started a crew of men at work thereat. The rangers then went to the camp of the Preston Mill Company, and meeting the foreman, consulted with him as to the preparations necessary to be made on that side of the proposed burn; telling the foreman of the preparations necessary to be made on the other and that such preparations would probably not be completed until some time in the afternoon. What further occurred at this interview is a matter of dispute in the evidence. It seems to have been understood, however, that no special preparations were necessary to be made on the Preston Mill Company's side of the burn, and that fires should be started on both sides thereof at the same time. The misunderstanding was as to the time the foreman of the Preston Mill Company should direct the fires to be started. He testified that no particular signal was agreed upon; that he understood he

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was to fire when he saw the fires started on the opposite side. On the other hand, one of the rangers testified (the other had died prior to the trial) that one of them would return when the preparations on the other side were completed and notify the foreman when the proper time arrived.

The foreman of the Preston Mill Company took a crew of men from the logging works and went out to the burn shortly after the noon hour. After staying some time, he saw, as he testified, black smoke arising from fires on the opposite side, and thinking them fires started for the purpose of burning the logged off tract, started the fires on his side. The fires he saw, however, were not fires set on the tract to be burned, but fires set in the debris around Waldy's camp, in the course of preparing for the final fire. One of the rangers was on his way over to the Preston Mill Company's side of the burn at the time the fires were started on that side. On seeing the fires, he hastened back and directed the fires to be started on the Northwest Lumber Company's side, notwithstanding the incomplete preparations. These fires, however, did not gain sufficient headway to check the onrush of the fires started by the foreman. The result was that the fires got beyond control and burned the Waldy construction camp, with all of the tools, groceries and furnishings therein.

This action was begun by Waldy against both the Preston Mill Company and the Northwest Lumber Company to recover for the losses suffered by the burning of the camp. At the conclusion of his case in chief, he was nonsuited as to the Northwest Lumber Company, and that company was dismissed from the action. The case continued as to the Preston Mill Company, and resulted in a verdict and judgment against it for the sum of \$500. From the judgment, the Preston Mill Company appeals.

The evidence at the trial disclosed that neither the fire warden nor the rangers had issued to the Preston Mill Company any written permit to burn the forest material on the land in question, and that the company had no such permit

from any other source. Pertaining to this matter, the court gave the following instruction to the jury:

"I instruct you further that, under the laws of this state, no one shall burn any forest material within any county in this state in which there is a warden or ranger, during the months of June to September, inclusive, in each year, which period is hereby designated as the closed season, without first obtaining permission in writing from the forester, or a warden, or a ranger, and afterwards complying with the terms of said permit, and that failure to comply with these regulations is negligence."

The appellant assigns error upon the giving of the foregoing instruction, contending that the rule therein announced, while perhaps applicable in certain circumstances, is not applicable to the circumstances of the particular case because the burning in this instance was under the immediate charge of rangers selected by the fire warden to take charge of the burning, and because it nowhere appeared in the evidence that the want of a written permit on the part of the Preston Mill Company was the proximate cause of the injury. It appears to us that the objection is well taken. The statute relating to forest fires and the burning of forest material will be found in 3 Rem. & Bal. Code in §§ 5277-1 to 5277-21. This statute does, in § 5277-8, provide that no one shall burn any forest material within any county in this state in which there is a warden or ranger during the months of June to September, inclusive, without first obtaining written permission of the fire warden or ranger, and afterwards complying with the terms of the permit; but a perusal of the remainder of the statute makes it clear that this prohibition was intended to apply to a case where a person disconnected with the forest service desired to do the burning, and has no application to a case where rangers are sent to superintend the burning and actually take personal charge thereof. Such, moreover, is the construction put upon the act by the persons having in charge its execution. It was testified by the fire warden himself that it had never been,

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and was not then, the custom of his office to issue written permits to burn forest material where the warden goes personally, or sends rangers, to take charge of the burning. Here rangers were sent by the fire warden having jurisdiction under the forest service over this territory to take charge of the burning. They did take charge of it, and authorized the appellant through its agent to set out the fire when a signal so to do should be given by the rangers. The agent misunderstood or mistook the signal, and started the fire before the protective preparations had been completed. The fire was, nevertheless, under the charge and direction of the rangers, and the appellant's liability for any injury done thereby cannot rest on the want of a written fire permit.

The appellant is liable for the destruction of the respondent's property, if it is so liable at all, on the principle that its agent in starting the fire failed to exercise reasonable and ordinary care in so doing. If the agent acted as a reasonably prudent person would have acted under like or similar circumstances, the appellant is not liable. If he failed so to act, it is liable. This question, and this question alone, should have been submitted to the jury.

The judgment appealed from is reversed, and the cause remanded for a new trial.

Crow, C. J., MORRIS, PARKER, and MOUNT, JJ., concur.

[No. 11672. Department One. June 6, 1914.]

A. NEITZEL *et al.*, *Appellants*, v. SPOKANE INTERNATIONAL RAILWAY COMPANY *et al.*, *Respondents*.¹

EMINENT DOMAIN—RIGHT OF WAY—REVERSION—ABANDONMENT—INTENTION—EVIDENCE—SUFFICIENCY. The evidence sustains a finding that a railway company had not abandoned a portion of its right of way and terminal grounds, condemned in anticipation of future needs, by leasing the same for a nominal sum to a wholesale concern for a warehouse, in return for an agreement for business, for the term of fifteen years with privilege of a ten-year renewal, where, pending trial, the lease was changed to shorten the term and give the company the right to terminate the lease on one year's notice, directors of the company testified that the company did not intend to abandon its easement, and the evidence was to the effect that all the grounds would soon be needed for and put to public uses of the company, and that the handling of freight was economized and the business of the railroad increased by the use of the buildings of the lessee.

SAME—RIGHT OF WAY—REVERSION—ABANDONMENT—MISUSE. A private use of a part of the terminal grounds of a railroad company by a wholesale concern for a warehouse, under a lease for nominal rent, upon an agreement to give the road all the lessee's business, does not work a reversion, when there was no abandonment of the easement; there being no reversion by misuse without abandonment, so long as the private use is incidental or contributed to the company's transportation business.

SAME—RIGHT OF WAY—REVERSION—ACTIONS—EVIDENCE OF INTENT—ADMISSIBILITY. In an action to declare a reversion of terminals, condemned for railroad purposes, which the company had leased for a warehouse, for nominal rent upon an agreement for all of the lessee's business, evidence that warehouses upon terminal grounds reduced the cost of unloading freight is admissible on the question whether the company in making the lease intended to abandon the easement.

SAME. In such a case, evidence that the lease was to obtain the business, and that it was worth \$20,000 a year, is admissible upon the question whether the making of the lease showed an intent to abandon the easement.

SAME. In such a case, the cancellation of a lease pending trial, and the execution of another for a shorter term, giving the company

¹Reported in 141 Pac. 186.

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the right to terminate it on one year's notice, is admissible as a circumstance upon the question of intent.

SAME—INSTRUCTIONS. Instructions in such a case summarized, and held to correctly state the law of the case.

NEW TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT. A new trial should not be granted for misconduct of counsel in argument to the jury, merely for making statements and drawing deductions not fully warranted by the record, it being presumed, when there was no grave abuse of privilege, that the jury determined the case on the evidence.

CONSTITUTIONAL LAW—DUE PROCESS—USE OF CONDEMNED PROPERTY. The condemnation of property for a railroad right of way and terminals, not presently needed or devoted to a public use, is not a taking without due process of law, where there has been no abandonment of the easement.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 23, 1913, upon the verdict of a jury rendered in favor of the defendants, in an action of ejectment. Affirmed.

Joseph Rossow, J. O. Bailey, and E. B. Hoffman, for appellants.

Cannon, Ferris & Swan and Allen & Allen, for respondents.

GOSE, J.—This action was brought to recover the possession of two lots in Spokane, for damages for withholding possession, and to have the eminent domain proceedings by which the railroad company acquired title to the lots held null and void because of fraud practiced upon the court in the proceedings. The complaint alleges that the railway company at all times intended to, and has, used the lots for private warehouse sites, and that it never intended to use them for a public use. A demurrer to the complaint was sustained and, upon appeal, the judgment was reversed. *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522. Upon the filing of the remittitur below, issue was joined on the questions of fraud, private use, and abandonment of the easement. In support of their de-

mand for a jury trial, the plaintiffs waived the charge of fraud in the eminent domain proceedings. The case was thereupon tried to a jury, resulting in a verdict and judgment for the defendants. The plaintiffs have appealed.

Upon the former appeal, we held (a) that the complaint states a cause of action upon the facts alleged arising since the entry of the judgment in the condemnation proceeding; (b) that the railway company acquired, by the eminent domain proceeding, "a qualified fee or an easement" for a "public use;" (c) "before a reversion will be awarded, it must be made to appear that the condemning corporation has *finally and positively* abandoned the application of the property to the public use, and *does not intend to restore it*;" (d) that the railroad company may plead and show that it has not "permanently abandoned the lots to a private use;" (e) that the respondent Benham & Griffith Company is using the property for a private use.

The first contention is that the verdict of the jury is not supported by the evidence. It is argued that the undisputed facts establish an abandonment of the easement for public purposes. The material facts touching this question are these: In 1906, the railway company leased to the respondent Benham & Griffith Company, a corporation, at a nominal rental, a portion of its terminal grounds, including the lots in controversy, for a term of fifteen years, with an option of renewal for ten years. The lessee was required to, and did, construct a two-story brick building upon the leased premises. It agreed in the lease to route all its business over the railway company's road. The respondent Benham & Griffith Company conducts a wholesale grocery business in the building. After the filing of the opinion on the former appeal, the lease was canceled by mutual agreement, and a new lease was entered into for a term of ten years with an option of renewal for a like period. This lease provides that the railway company may terminate the lease if it shall need or desire to use the premises during the term of the lease or

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the renewal thereof, by giving one year's notice. The railway company, between October, 1906, and May, 1909, made a number of other leases of portions of its terminal grounds for a term of ten years, with the privilege of renewing for a like term, and one lease for twenty years with a right to renew for the same period. These leases, also, provided that the lessees would route their freight over the respondent's line of road. Substantial structures were erected upon the premises covered by these leases, and the property was used for wholesale houses. All the property covered by the leases was acquired by purchase, except the two lots in controversy and one other.

Two of the directors of the railway company testified, that the company did not intend to abandon its easement for a public use; that it had an arrangement with the Oregon & Washington Railway Company for a joint user of its terminals under which it was temporarily operating, and that, in the near future, it expected to devote all the terminal grounds to a public use; that the company would soon need all its grounds and "a great deal more." Mr. Corbin, the president of the railway company, testified that he anticipated future needs when he was acquiring terminal grounds; that, before acquiring the property in controversy, the railway company acquired by purchase a tract of ground for terminals subject to a fifteen-year lease, which lease it would have been expensive to condemn, and that, because of that lease and a stringency in the money market and in order to get business for the company, it was thought advisable to make the leases to which we have referred. Representatives of other railroads with large experience testified that the respondent's entire terminal grounds were inadequate to handle the prospective business of the company. The general superintendent of the railway company said, that the entire terminal grounds would be needed "long before the lease has expired;" that the company needed team tracks, freight

sheds, and a passenger depot; that the present freight house was inadequate, and that the building upon the lots in controversy could be used for a freight warehouse "without tearing it down." It was further shown that the handling of the freight was economized by the construction and use of these buildings. Upon these facts, the jury was warranted in finding that the railway company had not "finally and positively abandoned the application of the property to a public use."

A public service corporation may anticipate future needs, and mere nonuser of a portion of its easement does not, of itself, constitute an abandonment. Whether or not there has been an abandonment depends upon the intention of the owner of the easement. While such intention may be deduced from long nonuser, the nonuse itself does not constitute an abandonment, and does not of itself defeat or impair acquired rights. *Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 40 Wash. 315, 82 Pac. 412; *Conabeer v. New York & H. R. Co.*, 156 N. Y. 474, 51 N. E. 402; *Pittsburgh, Ft. W. & C. Ry. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467. The same principle applies to a misuser. "A misuser, however great the perversion, is not an abandonment." *Proprietors etc. v. Nashua & L. R. Co.*, 104 Mass. 1, 6 Am. Rep. 681.

At the close of the case, the appellants moved for a directed verdict against the respondent Benham & Griffith Company, for the recovery of the possession of the property as against it, for damages, and for an injunction against a further misuser. The motion was denied, and this ruling is assigned as error. In view of the fact that the jury has found that there has been no abandonment of the easement, and that the railway company intends to devote the property to a public use as soon as public necessity requires, we think there can be no sound distinction between a nonuser and a misuser, so long as the use to which the property is put, although a private use, is incidental to the company's business as a transportation company. There has been no reversion

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until there has been an abandonment. This view finds support in the following authorities: *Roby v. New York Cent. & H. R. R. Co.*, 142 N. Y. 176, 36 N. E. 1053; *Peirce v. Boston & L. R. R.*, 141 Mass. 481, 6 N. E. 96; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Western Union Tel. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *Townsend v. New York Cent. & H. R. R. Co.*, 56 Misc. Rep. 253, 106 N. Y. Supp. 381; *Danville & W. R. Co. v. Lybrook*, 111 Va. 623, 69 S. E. 1066, Ann. Cas. 1912 A. 175; *Dillon v. Kansas City, Ft. S. & M. R. Co.*, 67 Kan. 687, 74 Pac. 251; *Illinois Cent. R. Co. v. Wathen*, 17 Ill. App. 582; *Abraham v. Oregon & C. R. Co.*, 41 Ore. 550, 69 Pac. 653; *Railroad v. French*, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. 752; *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635; *State v. Baltimore & Ohio R. Co.*, 48 Md. 49.

In *Roby v. New York Cent. & H. R. R. Co.*, *supra*, the railway company had leased a portion of its terminal ground which it had acquired by condemnation proceedings, for a term of fifteen years, subject to the right of the company to terminate the lease upon giving six months' notice. The lease provided that the lands should be used for a coal yard and trestles for the purpose of receiving and handling coal transported over the company's road. An action was prosecuted by the owner of the fee to recover possession upon the ground of an alleged abandonment. In denying relief, the court said:

"While it has been held in some cases that the owner of the fee, subject to the railroad easement, has some right to use the land taken, not inconsistent with the easement, the better view of the law, supported by the greater weight of authority, is that the use of the railroad company while the easement exists is exclusive of the owner of the fee. (Pierce on Railroads, 159, 160, and cases cited; Mills on Eminent Domain, § 208; *Hazen v. B. & M. Railroad Company*, 2 Gray 574; *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349.) . . . An easement may be abandoned by unequivocal acts showing a clear intention to abandon, or by mere non-user,

if continued for a long time. The mere use of the easement for a purpose not authorized, the excessive use or misuse, or the temporary abandonment thereof, are not of themselves sufficient to constitute an abandonment. (Washburn on Easements, 2d ed. 631, *et seq.* and cases cited; *Hoggatt v. Railroad Company*, 34 La. An. 624; *Curran v. City of Louisville*, 88 Ken. 628; *Proprietors of Locks, etc., v. N. & L. R. R. Co.*, 104 Mass. 1; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Crain v. Fox*, 16 Barb. 184; *Snell v. Levitt*, 110 N. Y. 595.)"

In *Peirce v. Boston & L. R. R.*, the depot master was given the use of a garden, a stable, and a part of a building upon the station grounds not used for depot purposes. He gave his services and a cash rental for these privileges. Action was prosecuted by the owner of the fee. In denying relief, the court said:

"No occupation of land taken for depot and station purposes, which is not inconsistent with its use for such purposes, can be evidence of a claim to the fee; and any occupation of it which is concurrent with and does not exclude its occupation for station purposes must be presumed to be under that right. The manner in which it shall be used for the designated purposes is in the discretion of the corporation, and is no concern of the landowner. Even if the corporation exceeds its franchise in the manner of such occupancy, it does not thereby dispossess the owner of the fee. . . . The whole demanded premises were occupied as the station, and furnishing food, lodging, horse-keeping, and horse-hire; and allowing buildings upon it to be used for a boarding-house and a stable, and some of the land to be cultivated, all for the convenience of its passengers and others, in order to increase the business of the road, were incident to its business as a passenger carrier, and consistent with its occupation for the purposes for which it was taken, and with a claim to occupy for those purposes."

In *Danville & W. R. Co. v. Lybrook*, it is said:

"Of course, as the opinion in that case holds, a railroad is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of pass-

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engers and shippers, but it is under no obligation to refrain from using its property to the best advantage of the public and itself."

The *Dillon* case was an action by the owner of the fee for possession and damages. After condemning the land for catching and storing surface water for use in operating its engines, the defendant put the land to the use for which it had been condemned, and leased it to a fishing and boating club for a period of five years, subject to termination at the option of the defendant by giving thirty days' notice. Upon the plaintiff's appeal, it was held that "there can be no concurrent occupancy of railroad property in actual use by it in the operation of its business without its consent." In *Abraham v. Oregon & C. R. Co.*, *supra*, the company leased a portion of its easement "for eating house and hotel purposes," for the use and accommodation of its passengers and employees. In an action to enjoin such use, the court said:

"The courts cannot undertake to draw any nice distinction, or apply any arbitrary test, to determine the necessity of establishing or maintaining such places of entertainment by railway companies, and so long as it appears that they are not wholly foreign to the business of the corporation, the courts will not interfere with them."

In *Railroad v. French*, it was held that the use of a portion of the right of way by the owner of the fee for any legitimate purpose was not adverse to the road easement, and that the company could resume full possession and control at any time its necessities required it to do so. In *Michigan Cent. R. Co. v. Bullard*, it was held that a lease subject to termination in sixty days, made by a railroad company of a portion of its right of way to a manufacturing company, with a view to affording facilities for furnishing freight to the company, was not invalid. *Gurney v. Minneapolis Union Elevator Co.*, 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534, was an action by an owner of the fee to recover the possession of a portion of a railroad right of way and the rents and profits. The

defendant had constructed and was operating a public grain elevator upon the premises sought to be recovered, under a license from the railroad company. It was held that such use was in aid of the public purposes for which the land had been acquired.

A railway company has the right to the exclusive possession of the land condemned, in the absence of a limitation in the statute or in the decree, until there has been an abandonment of the easement. *Railway v. Combs*, 51 Ark. 324, 11 S. W. 418; *New York & N. E. R. Co. v. Comstock*, 60 Conn. 200, 22 Atl. 511; *Brainard v. Clapp*, 10 Cush. 6, 57 Am. Dec. 74; *Hopkins v. Chicago, St. P., M. & O. R. Co.*, 76 Minn. 70, 78 N. W. 969.

The appellants argue that, where there has been a misuse or an excessive use of the easement, the owner of the fee is entitled to a judgment declaring his ownership of the fee subject to the easement and for damages for the wrongful use; citing *Proprietors etc. v. Nashua & L. R. Co.*, 104 Mass. 1; *Chicago, R. I. & G. R. Co. v. Clark* (Tex. Civ. App.), 146 S. W. 989; *Lyon v. McDonald*, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295; *Strong v. Brooklyn*, 68 N. Y. 1; *Ayer v. Phillips*, 69 Me. 50. These cases support their contention. The appellants have also cited a number of street cases. Such cases are not analogous, because the owner of a fee in a street may use the street for any purpose not inconsistent with the easement; whereas, the easement of a railroad company is, in its very nature, exclusive and there can be no concurrent occupancy without the consent of the company.

The question is an open one in this state, and we think the better view is that, until the intention to apply the property to a public use has been abandoned, there can be no reversion and no disseizin, and hence no right of action, so long as the property is applied to a use incidental to, or which contributes to, the public business of the transportation company. Moreover, we think this is a just rule, because it is well known

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that, in eminent domain proceedings, the owner receives full compensation for his property.

The respondents were permitted to ask the general superintendent of the railway company whether wholesale houses and warehouses were necessary for the building up of the railroad business. Upon objection, the court permitted the witness to answer, stating that it was admitted only for the purpose of throwing light on the question as to whether, in making the lease, the company intended to abandon its easement. The witness answered that warehouses upon terminal grounds reduced the cost of unloading the freight. As thus limited, there was no prejudicial error in the ruling.

Mr. Corbin, the respondent's president, after testifying that, when he executed the Benham & Griffith lease on behalf of his company, he had no intention of abandoning the property for a public use, and after saying that, looking to the future, the company needed the property for its terminals because the population doubles every ten years and because the business of the company was increasing, was asked whether other railroads would have taken the property if his company had not, and answered that the Great Northern Railway Company attempted to take it after finding that his company was acquiring it for terminal grounds. The court admitted the testimony as bearing on the question of intention to abandon. This is assigned as error. While we think it throws little or no light on the question of intention, and that it would not have been error to exclude it, and that it probably should have been excluded, the error, if any, is too slight to justify a reversal. *Chicago, Milwaukee & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515.

The same witness testified that the company will need the property sooner than he anticipated when the lease was made. He was then asked his reason for making the lease, and answered that it was to get revenue for the new road while it was establishing a business; that it gave the company business which it would not have otherwise obtained. He was then

permitted to state that the revenue derived from the Benham & Griffith business was approximately \$20,000 a year. This testimony was also admitted as reflective of the intention of the company. We think it was a circumstance tending to aid the jury in determining whether the making of the lease showed an intention to abandon the property. *Anderson v. Interstate Mfg. Co.*, 152 Iowa 455, 132 N. W. 812, 36 L. R. A. (N. S.) 512.

After the filing of the opinion on the first trial, the respondents, by mutual agreement, canceled the lease, and a new lease was executed for a term of ten years, with an option to renew for a like period, subject to termination if the respondent should need or desire to use the premises during the term of the lease or the renewal thereof, by giving one year's notice. The admission of the second lease in evidence is assigned as error. It was clearly admissible as a circumstance upon the question of intention.

The appellants assign error in the refusal of the court to give certain requested instructions. We cannot discuss the assignments, either separately or collectively, without unnecessarily extending the opinion. We pass them with the remark that the instructions given cover the ultimate facts to be determined by the jury.

The court instructed the jury, in substance, that the questions for them to determine were whether or not the respondent had abandoned the property involved in the suit for railroad purposes, and if so, the amount of damages the appellants should recover; that the appellants were the owners in fee simple of the property; that the respondent corporation acquired only an easement by condemnation; that the term easement means the right to use the land for a public purpose; that, if the easement had been abandoned, the appellants were entitled to recover possession; that the use to which Benham & Griffith was putting the land was private; that, if the jury found that respondent intended to permanently devote the land "to the use to which it is now put,"

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the verdict should be for the appellants; that the lapse of time does not, of itself, constitute an abandonment, but is a circumstance for the jury to consider in arriving at the intention of the respondent; that an intention to abandon property for which one has paid value will not be presumed, and that if a railway company condemns land for future use, land which it does not need at the time, the nonuser of a portion for private purposes is not an abandonment. The court further instructed that the respondent, in acquiring lands for terminal grounds, had a right to anticipate future needs, and that it was not restricted to acquiring only such land as it absolutely needed at the time it condemned it; that it might acquire such land as it might reasonably anticipate it would need in the future; and that, in arriving at the intention of the respondent to abandon the land for a public use, the jury should consider all the facts as disclosed by the testimony relating to the lease to respondent Benham & Griffith, the use to which the property was being put, the nature of the buildings on the land, and the leases to other persons of portions of the right of way, and all other facts and circumstances disclosed by the testimony. The court further instructed that the misuse of an easement is not in itself an abandonment, and that the burden was upon the appellants to show, by a preponderance of the evidence, that the respondent "has finally and positively abandoned the application of the property to the public use and does not intend to restore it." The instructions announce correct legal principles, and are in harmony with the law of the case as determined on the former appeal.

Counsel for the respondent, in his opening statement, said that, when the respondent began acquiring its right of way, the Great Northern Railway Company became an active competitor for the property in order to embarrass the respondent, and that the property owners raised prices so that it became necessary to condemn the property in controversy. During the progress of the trial, counsel for the respondent

called a member of the legal department of the Great Northern Railway Company to the witness stand and asked him if he was interested in the case. An objection was thereupon interposed and sustained. In the course of his address to the jury, counsel for the respondent said: "Since the Great Northern attorney went back home, since we caught him at it." He also referred to the fact that the complaint charged that there was fraud in the eminent domain proceedings; that the appellants got into court on an allegation of fraud, and after this court had said that the respondent ought to answer, the appellants abandoned the charge. It is argued, upon the facts stated, that counsel for the respondent was guilty of such misconduct as to render the granting of a new trial imperative. We held to the contrary upon similar facts in *Chicago, Milwaukee & P. S. R. Co. v. True, supra*. If a new trial were granted for every departure from the record committed on the firing line in hotly contested cases, such cases would never end. The zeal of counsel often leads them, in the heat of debate, to make statements and to draw deductions not fully warranted by the record, and, except in cases of grave abuse of privilege, it must be presumed that the jury heeded the admonition of the court and determined the case upon the evidence.

The last contention is that the appellants' property is being taken without due process of law and in contravention of the fourteenth amendment of the Federal constitution. The answer to this contention is that an easement in their property was taken and full compensation rendered in the condemnation proceeding in 1905, and that the jury, upon all the facts, has found that there had been no abandonment of the easement.

Affirmed.

Crow, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

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[No. 11713. Department Two. June 6, 1914.]

THE CITY OF POMEROY, *Respondent*, v. A. P. RUTHERFORD,
Appellant.¹

HAWKERS AND PEDDLERS—DEFINITION—SOLICITATION BY SAMPLES. One who solicits the sale of goods by sample, in a house to house canvass, and later fills the orders by delivery from a house where he had assembled the orders from goods shipped to him, is a "peddler," both at common law, and within an ordinance for the licensing of peddlers which provided that a peddler selling from samples and maintaining a supply depot within the city shall be deemed a peddler.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered January 29, 1913, upon a trial and conviction of peddling without a license. Affirmed.

G. W. Jewett, Charles M. Chamberlain, and Moya Wicks,
for appellant.

C. Alex McCabe and E. V. Kuykendall, for respondent.

FULLERTON, J.—The city of Pomeroy duly enacted an ordinance prohibiting any person, firm, or corporation from prosecuting or carrying on certain named businesses, occupations, and professions, within the corporate limits of the city, without first obtaining a license therefor. Among the occupations enumerated was that of peddling merchandise, and for this occupation the person desiring to engage therein was required to pay a fee varying with the length of time for which the license was taken. The section of the ordinance relating to peddlers of merchandise also provided, "that each peddler selling from samples, and maintaining a supply depot within the corporate limits of the city, shall be considered a peddler within the terms of this ordinance."

The appellant was arrested on a warrant issued out of a justice's court for a violation of the ordinance, and on a trial in that court was convicted and sentenced to pay a

¹Reported in 141 Pac. 178.

fine. He appealed to the superior court from the judgment of conviction, and on a retrial therein was again convicted. From the judgment pronounced upon him on the last mentioned conviction, he appeals to this court.

The appellant was engaged in selling baking powder, tea, coffee, sugar, and spice. He would make a house to house canvass, carrying samples of his goods, and solicit orders from the inmates of the houses visited, agreeing to deliver goods of the character desired of the grades shown by the samples. When he had accumulated a reasonable number of orders, he would send them to a concern doing business in a neighboring city to be filled. The manner in which the orders were filled seems to be thought to have a bearing upon the controversy, and is a subject of dispute between the parties. The evidence does not make the point entirely clear, but we gather therefrom that the concern filling the orders would select from its stock quantities of the several articles ordered equal to the sum total of the orders. The bulk articles, such as coffee, sugar, and perhaps tea, would be placed in packages in weight and quality corresponding with the several orders; while the articles usually sold in the containers in which they were received from the manufacturers, such as baking powder and spice, would be left in the original containers. The whole would then be packed in boxes in a manner to secure their safe transfer, and consigned to the appellant at Pomeroy. The appellant, on receipt of the packages, would take them to a house in Pomeroy, which he had secured in which to store the goods, where he would assemble them according to the several orders, and afterwards deliver them to his several customers, collecting the sums agreed to be paid therefor at the time of the delivery.

The appellant contends that, under the facts shown, he was not a peddler, either as that term is understood in its ordinary and usual signification, or as defined by the ordinance of the city which requires peddlers to take out a license prior to following their vocation. It is argued that a peddler,

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in its ordinary signification, is a small retail dealer, who travels from house to house, or from place to place, either on foot, or in a vehicle, and exposes and sells merchandise which he carries with him, and is not a person who first goes about in the same manner, takes orders for goods according to a sample, and afterwards carries the goods to the person giving the order; and second, that he is not a peddler within the definition of the ordinance, because he did not maintain a supply depot within the corporate limits of the city of Pomeroy.

We think, however, that neither of these contentions are maintainable. Unquestionably, the definition of a peddler, as given by the older authorities, contemplates a person who carries with him the goods and wares he has for sale, and not a person who first solicits orders for such merchandise and subsequently delivers it in fulfillment of the orders, and there are modern cases which maintain the same principle. But we think the trend of authority is to widen the definition. In *Grafty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128, it was held that a statute authorizing municipalities to license hawkers and peddlers, authorized the licensing of persons going from house to house selling or offering for sale goods at retail, whether the goods be carried along for delivery presently, or whether the sales were made by sample for future delivery. In the course of the opinion, the court said:

“If the itinerant trader may avoid an ordinance enacted to subserve the ends which we have supposed, by going from house to house, making sales, merely exhibiting samples of his wares, leaving another to follow to deliver the goods, or making the delivery by any other method, all the evils which were intended to be guarded against remain; while none of the protection contemplated is afforded. . . .

“Any method of selling goods, wares or merchandise by outcry on the streets, or public places in a city, or by attracting persons to purchase goods exposed for sale at such places, by placards or signals, or by going from house to house, sell-

ing or offering goods for sale at retail, to individuals not dealers in such commodities, whether the goods be carried along for delivery presently, or whether the sales are made for future delivery, constitutes the person so selling a hawker or peddler within the meaning of the statute."

To the same effect are the cases of *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333; *City of Alma v. Clow*, 146 Mich. 443, 109 N. W. 853; *Allport v. Murphy*, 153 Mich. 486, 116 N. W. 1070; and *Titusville v. Brennan*, 143 Pa. St. 642, 22 Atl. 893, 24 Am. St. 580.

On principle it would seem hard to make a rational distinction between the vocation of a person who makes sales of wares by canvass from house to house and delivers the wares immediately, and one who sells in the same manner but delivers later on in the same day, or on the next or some succeeding day. As was said in the Pennsylvania case cited:

"There is in each case the same intrusive domiciliary visitation, the same relentless pursuit of a purchaser, the same practiced and persistent itinerant salesman adroitly pressing his wares on the attention of those who neither need nor wish for them, but who are unable to resist the wiles or penetrate the deception practiced upon them."

The purpose of the ordinance is both regulation and revenue, and when the vocation followed is within the spirit of the ordinance, one guilty of violating such spirit ought not to be allowed to escape on a too narrow definition of its terms.

But we think the appellant is guilty under the definition of a peddler contained in the ordinance. Clearly he sold by sample and maintained a supply depot within the corporate limits of the city of Pomeroy. The depot may not have been extensive, but it was the immediate source from which he drew the supplies for delivery to his customers, and thus comes within the accepted definitions of the term.

The judgment is affirmed.

CROW, C. J., MORRIS, PARKER, and MOUNT, JJ., concur.

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[No. 11717. Department Two. June 6, 1914.]

CHARLES H. RICE, *Respondent*, v. PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, *Appellant*.¹

CARRIERS—INJURIES TO PASSENGERS—TAKING ON DISABLED PASSENGERS—SUDDEN STOPS—PROXIMATE CAUSE. Where a street car was started before a passenger, walking with crutches, had time to get a seat, and he was thrown to the floor by an emergency stop which was necessary to avoid injury to a person on the crossing, the starting of the car before the passenger was seated was the proximate cause of his injury.

SAME—TAKING ON DISABLED PASSENGERS—SUDDEN STOPS—NEGLIGENCE—QUESTION FOR JURY. The negligence of a street railway company in starting a car before a passenger, walking with crutches, could take a seat, is for the jury, where he was thrown to the floor by an emergency stop to avoid injury to a person on a crowded city crossing.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,000 for injuries to a disabled knee, twice previously injured and already in a chronic tubercular condition, is excessive, and should be reduced to \$2,500.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 21, 1913, upon the verdict of a jury rendered in favor of the plaintiff for \$4,000 for personal injuries sustained by a passenger in a street car. Reversed, unless \$1,500 is remitted.

James B. Howe and *H. S. Elliott*, for appellant.

Arthur E. Griffin (*W. H. Harris*, of counsel), for respondent.

FULLERTON, J.—The appellant owns and operates a system of street railways in the city of Seattle. The respondent was injured by the sudden stopping of one of the appellant's cars while a passenger thereon, and brought this action to recover in damages for the injury so received. At the trial, the jury returned a verdict in the respondent's favor in the

¹Reported in 141 Pac. 191.

sum of \$4,000, on which judgment was entered. This appeal followed.

The accident occurred on the Third Avenue line of the appellant. There is a double track line on this street which crosses the James street cable line at James street. The cars whichever way moving stop to receive and discharge passengers just prior to crossing James street. The car on which the respondent was injured stopped at the usual stopping place, and the respondent, with a number of other persons, entered it. The respondent had theretofore received an injury to his knee and was walking with crutches. After he had entered the car, and before he had reached a vacant seat, the car was started on the signal of the conductor. He continued on his way, and just as he reached a seat and was about to enter it, the car was stopped by the application of the emergency brakes. As a result he fell to the floor of the car.

There was evidence on the part of the appellant, to which there was little if any contradiction, to the effect that a car of the appellant had stopped on the other side of James street, and that, just as the front of the car on which the respondent was riding reached the back of such standing car, two men stepped out from behind the standing car and onto the track of the moving car, and that the stopping of the moving car by the application of the emergency brakes was necessary in order to avoid running them down.

The appellant first assigns error upon the refusal of the trial court of its motion for a directed verdict. It argues that, conceding it to be negligence on its part to start its car before the respondent had time to reach a seat, such act did not cause the respondent to fall, and hence, was not the proximate cause of the injury; that the proximate cause of the injury was the act of stopping the car in order to avoid running down the pedestrians who suddenly stepped in front of it, and that for this act it is not liable because it was called upon in an emergency to choose between two conflicting duties, and there is no evidence to show that it did not act as

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a reasonable and prudent carrier of passengers would have acted under the circumstances.

It is probably the rule that, where a carrier of passengers is confronted with a situation not of its own making, where it is compelled to choose between the conflicting duties of avoiding injury to its passengers or injury to some stranger who has inadvertently placed himself in a dangerous situation with reference to the instrument of carriage, it is not liable for the injury to either the one or the other if it acts as a reasonably prudent person would have acted under the circumstances. But we think the facts shown here do not present the condition suggested. Contrary to the contention of the appellant, we think a street car company operating its cars in a crowded and populous city is bound to anticipate that it may be called upon to stop its cars suddenly at any time, and is bound to anticipate that such sudden stopping may cause injury to its aged, crippled and otherwise infirm passengers who have not had time to become properly seated before the starting of the car. This being the rule, it must follow that, in a case where an infirm passenger is injured while endeavoring to reach a seat, by the sudden stopping of the car, which has been started before he has had time to obtain a seat, the proximate cause of his injury is the starting of the car before such time, and not its sudden stopping after it had been once started without injury to the passenger.

Such is the case before us. The respondent was so far infirm as to require the use of crutches to enable him to walk. When he entered the car, it was the duty of the conductor to wait until he secured a seat before directing the car to start, and his failure to do so was negligence. At least, it was for the jury to say whether or not it was negligence, and in this case the trial judge submitted the question to them. *Plattor v. Seattle Elec. Co.*, 44 Wash. 408, 87 Pac. 489; *Stoddard v. St. Louis & M. R. R. Co.*, 105 Mo. App. 512, 80 S. W. 33; *Brady v. Springfield Traction Co.*, 140 Mo. App. 421, 124 S. W.

1070; *Steeg v. St. Paul City R. Co.*, 50 Minn. 149, 52 N. W. 393. Again,

"It is well established that, where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the injury, or if the accident would not have resulted in an injury excepting for the negligent act, the negligence is the proximate cause of injury for which damages may be recovered." *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182.

See, also, *Williams v. Ballard Lumber Co.*, 41 Wash. 338, 83 Pac. 323; *Akin v. Bradley Engineering & Mach. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Thoresen v. St. Paul & Tacoma Lum. Co.*, 73 Wash. 99, 131 Pac. 645, 132 Pac. 860.

It is contended that the verdict is excessive. The respondent was first injured in his knee in July, 1909. Following this, and as a result of the injury, he was, in October of the same year, compelled to suffer a surgical operation for the removal of a broken cartilage, which left him a cripple and necessitated his walking with crutches until June, 1911. He went to work for the first time in November, 1911, when he began operating an elevator. He continued at this work until June 26, 1912, when he was forced to stop because of tuberculosis developing in his injured knee. He again injured the same knee in June, 1912, which again compelled him to resort to crutches. These he was using at the time of the injury for which he sues in this action. His knee had not been free from tuberculosis from the time it first developed while operating the elevator, although it seemingly had been reduced to a more or less chronic state at the time he was last injured. In the light of these facts, we think the verdict excessive. The appellant was not responsible for the prior injuries to the knee, nor for its tubercular condition, yet we think the jury visited upon it the entire penalty. As we view the record, a recovery in excess of \$2,500 would be excessive.

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The judgment is therefore reversed, and the cause remanded with instructions to allow the respondent thirty days after the going down of the remittitur to elect in writing whether he will accept a judgment of \$2,500, or submit to a new trial. If he elects to accept a judgment in the sum named, the trial court will enter a judgment in his favor for that sum. If he fails to so elect, a new trial will be awarded.

Crow, C. J., PARKER, and MOUNT, JJ., concur.

[No. 11719. Department One. June 6, 1914.]

BARBER ASPHALT PAVING COMPANY, *Appellant*, v.

M. L. HAMILTON *et al.*, *Respondents*.¹

APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY. An appeal from the dismissal of an action to restrain the county commissioners from re-letting a contract for highway construction, and from interfering with the plaintiff in the performance of a contract let to it for the same work, will be dismissed on account of cessation of the controversy, where, pending the appeal, it is made to appear by uncontroverted affidavits that the contract has already been relet to another, who is performing and had approximately completed the work.

INJUNCTION—BREACH OF CONTRACT—DAMAGES—PLEADINGS—ISSUES. An action to enjoin the county commissioners from re-letting a contract for state highway work, under 3 Rem. & Bal. Code, § 5879-1 *et seq.*, and from interfering with the plaintiff in the performance of a contract let to it for the same work, does not state a cause of action for damages, where neither the county nor state was made a party, and there was no allegation of the incurring of expense or of possible profits in the performance of plaintiff's contract; and mere uncertainty in the measure of damages is not ground for maintaining an action to restrain a breach of contract.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 24, 1913, dismissing an action for an injunction, after a trial on the merits to the court. Appeal dismissed.

¹Reported in 141 Pac. 199.

William H. Pratt, Peters & Powell, and Marion Edwards,
for appellant.

*John F. Murphy and Samuel Morrison (W. H. White, of
counsel),* for respondents.

ELLIS, J.—This is an action for an injunction to restrain the breach of a contract, claimed to have been let to the plaintiff by the defendants for the construction of a permanent highway, under the provisions of the permanent highway act, chapter 35, Laws of 1911, page 118 *et seq.*, as amended by chapter 154, Laws of 1913, page 484 *et seq.*, the act as amended being found in 3 Rem. & Bal. Code, §§ 5879-1 to 5879-19, inclusive. On an *ex parte* application, a temporary restraining order and order to show cause was entered. The show cause order was heard upon the complaint of the plaintiff, the answers and affidavits of the defendants, two supplemental answers, and the reply.

It is admitted that the defendants, as commissioners of King county, passed the necessary resolution and caused to be prepared plans and specifications for the improvement of permanent highway No. 4, in King county, 6.13 miles in length; that these preliminary proceedings received the approval of the state highway commissioner, as required by the law; that the defendants advertised for bids for the work; that the plaintiff and others submitted bids pursuant to such advertisement, and that the defendant commissioners, by a majority vote, accepted the offer of the plaintiff as being the lowest responsible bid for the work; that, pursuant to such award, the plaintiff executed a contract in the form prescribed in such cases, and filed the contract so executed with the clerk of the board, together with a sufficient surety bond for \$141,177, the full amount of the contract, and a like bond for \$30,650, conditioned for the maintenance of the paving for a period of five years, in compliance with the award; that the defendants have since ignored this award and have refused to execute any contract with the plaintiff, and it is al-

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leged that they will prevent the plaintiff from performing any work upon the highway unless restrained from so doing. These things, which are alleged in the complaint, are admitted by the answer.

The plaintiff further charged that the defendants were about to permit a reduction of the bid of an unsuccessful competitor of the plaintiff and award a contract upon such reduced bid. The defendants deny that they intend to accept any of the bids made under the first advertisement, and aver that they will not let any contract except in pursuance of bids to be called for under a new advertisement. As an affirmative defense, the defendants pleaded, in substance, that the bid of the plaintiff was for the paving of four miles of the highway with a patented compound called "Warrenite," and the remainder with vitrified brick; that the bid was inseparable, and while the cost of the part to be laid in brick under the plaintiff's bid was in excess of other bids, the plaintiff's bid for the entire work was the lowest bid. It is further averred that the defendants, upon investigation since the award, have become satisfied that Warrenite is not sufficiently durable to be suitable paving material on this permanent highway. It is also alleged that the price of 52 cents a square foot to be paid under the plaintiff's bid is more than 100 per cent greater than a fair, just and reasonable price, and that the use of a patented material for the road is, in any event, unlawful. Finally, it is averred that King county is the real party in interest, and a necessary defendant, and that the plaintiff has a plain, speedy and adequate remedy at law for damages, if it suffer any, on account of the past and contemplated acts of the defendant in the matter of improving the highway. Before the hearing, a supplemental answer was filed to the effect that the certified check accompanying the plaintiff's bid had been returned to, and accepted by the plaintiff; that the commissioners had reconsidered their action in accepting the plaintiff's bid, and had revoked, annulled and set aside the award to the plaintiff, and so noti-

fied the plaintiff, and that the commissioners had rejected all bids and re-advertised for the letting of a contract for the improvement, with brick surfacing and a concrete foundation.

The plaintiff, replying to the answer and supplemental answer, denied that the use of the patented article, Warrenite, would be unlawful, denied that the price was excessive, denied that it is wanting in durability or fitness for the contemplated use, and reiterated the claim that an action at law for damages would not afford adequate relief. At the hearing, the defendants orally pleaded a second supplemental answer to the effect that they had re-advertised for bids for surfacing and pavement with brick; that bids were received pursuant to the advertisement; that the bid of one Andrew Peterson had been accepted by the defendants; that a contract had been entered into with Peterson for the work; that Peterson had filed the necessary bonds in connection with the contract; that the bonds were approved, and that the contractor, Peterson, had entered upon the performance of the contract and "that contract today is approximately performed."

To this, the second supplemental answer, the plaintiff orally replied, denying sufficient knowledge or information of the things alleged to form a belief. On the trial, no evidence was offered save a written stipulation by the owners of the Warrenite patent, which it is admitted was filed before any bids were let, to the effect that they would furnish the necessary Warrenite to King county, or to any successful bidder, at the rate of 52 cents a square foot. At the final hearing, upon the statement of the case to the court, and the introduction of this agreement, it appearing that the check which accompanied the plaintiff's bid had been returned to, and accepted by, the plaintiff, the defendants moved that the action be dismissed for insufficiency of evidence, and on the ground that the complaint did not state a cause of action. The motion was granted and a judgment of dismissal and for costs was entered. The plaintiff appealed.

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The respondents have moved to dismiss this appeal, upon the ground that there has been a cessation of the controversy involved; that the right, if any existed, to injunctive relief has now ceased to exist; that the questions presented are moot questions; and on the further ground that the appellant acquiesced in the reletting of the building of the road on different plans and specifications, and that the new contract has been approximately performed.

The determination of this motion to dismiss involves two questions: (1) Has the right to injunctive relief ceased to exist? (2) Does the complaint, to which neither the state nor the county of King is a party, state a cause of action for damages?

I. The supplemental answer, orally pleaded at the hearing, alleged that, at that time, the contract had been re-let to Peterson for a brick pavement throughout; that he had given the necessary bonds and that he had approximately performed the work. The only reply to this was a denial of any knowledge or information sufficient to form a belief. There is grave doubt whether such a denial was sufficient to put the truth of these allegations in issue. The letting of the contract to Peterson as pleaded would be matter of public record to which the plaintiff has access. The means of information were presumably within its knowledge. As to the letting of the contract, the denial of knowledge or information might well be held insufficient. *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752; *Olympia v. Turpin*, 70 Wash. 581, 127 Pac. 210; *State ex rel. Kennedy v. McGarry*, 21 Wis. 502; *City of Milwaukee v. O'Sullivan*, 25 Wis. 666; *Goodell v. Blumer*, 41 Wis. 436; *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; Bliss, Code Pleadings, § 326; 1 Ency. Plead. & Prac., pp. 811, 812, 813.

In any event, affidavits filed in this court in support of the motion for dismissal show that the board reconsidered the acceptance of the plaintiff's bid and rescinded the order of acceptance; that it adopted a resolution to the effect that it

was for the best interests of the public that the highway in question be constructed with a brick surfacing and concrete foundation; that advertisement for the work be so limited; that the county engineer be instructed to prepare and file plans and specifications for the work as indicated and as theretofore approved by the board and the highway commissioner; that a re-advertisement for bids was had; that Peterson was the lowest bidder, and that, on motion, the contract was awarded to him for paving with No. 2 brick with a five-inch concrete base and five years' maintenance for the sum of \$149,750. It also appears by affidavit that Peterson is proceeding with the work, that the larger part of it has been performed and that it will be completed by March 1, 1914. These things are not controverted. Since the relief asked for was an injunction restraining the defendants from re-letting the contract and from interfering with the plaintiff in the performance of its contract, and since, as shown by these uncontroverted affidavits, the contract has been re-let and the plaintiff has already been prevented from performing the work, which is now approximately completed, it is clear that the right to injunctive relief no longer exists. We have repeatedly held that where, pending an appeal, the controversy between the parties or the right involved in the action has ceased to exist, the appeal will be dismissed upon a showing thereof, either by the record or by evidence produced in this court, upon the ground that there is no subject-matter upon which the judgment could operate.

In *National Surety Co. v. Stephens*, 50 Wash. 397, 97 Pac. 449, it was held that an appeal from a judgment dismissing an action to enjoin the issuance and payment of county warrants will be dismissed where it is made to appear by affidavit before the hearing that the warrants had been issued and paid (there having been no temporary injunction), since the controversy had ceased. It is there said:

"The affidavit in support of the motion shows that the proper officers of Spokane county have caused warrants to

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issue in conformity to the aforesaid contract in the aggregate sum of \$5,000; that in due course of business, the warrants were called for payment by the county treasurer, and that the same have been paid and the amount thereof has been received in cash by Stephens. These facts are not controverted by the appellant, and it therefore appears that the respondents, not being under the prohibition of any injunction, proceeded to the issuance and payment of the warrants, notwithstanding the pendency of the appeal. We think it clear that there is now no controversy, since the very thing the action sought to prevent has been accomplished."

See, also, *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *State ex rel. Coiner v. Wickersham*, 16 Wash. 161, 47 Pac. 421; *State ex rel. Scottish-American Mtg. Co. v. Meacham*, 17 Wash. 429, 50 Pac. 52; *State ex rel. Land v. Cristopher*, 32 Wash. 59, 72 Pac. 709; *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811; *Stevens v. Jones*, 40 Wash. 484, 82 Pac. 754; *Wilson v. Fraser*, 67 Wash. 347, 121 Pac. 829; *Vollman v. Industrial Workers of the World*, 79 Wash. 192, 140 Pac. 337. In nearly all of the foregoing cases it was held that this court will not entertain jurisdiction of an appeal for the sole purpose of determining a question of costs. See, also, *Smith v. Palmer*, 38 Wash. 276, 80 Pac. 460; *Washington Market Co. v. District of Columbia*, 137 U. S. 62; *Little v. Bowers*, 134 U. S. 547.

From the facts established by the affidavits above referred to, it is clear that the injunctive relief asked for cannot be granted. It is also clear that no mandatory injunction placing the parties in *statu quo*, by compelling the commissioners to undo what they have done, can issue. No court would require the tearing up of the pavement, already practically completed at the time of hearing the appeal, in order that the plaintiff might be permitted to proceed with its alleged contract and replace the work along plans not now approved by the county commissioners. A sound public policy would forbid it.

II. Whether the court, upon proper pleadings and a prayer to that effect, could remand the action in order that the county commissioners, the only defendants in this action, might be compelled to answer personally in damages for what cannot be undone, is not before us. No such relief is asked on this appeal. In fact, the appellant disclaims the right to any relief against the commissioners personally. In its brief, the appellant states:

"The statute contemplates that the board of county commissioners and the contractor shall be the parties to the contract; and it may be argued that the board or its members would be liable for a breach of the contract. But the board as such is not a legal entity that may be sued; and if it could be sued and a judgment obtained against it, there would be no property out of which the judgment might be satisfied. The members of the board are not liable, because they are administrative officers charged with the exercise of judgment and discretion, and such officers are not liable to a private person for their mistaken or wrongful acts."

Be that as it may, it is certain that the complaint in this action states no cause of action for damages. Whatever damages might be recovered in any such case must be only compensatory. The measure of damages would, of course, be the expenses incurred by the appellant on the faith of the contract, if it has one, and looking to its performance, and possibly the net prospective profits which could reasonably be anticipated from the performance of the contract. There is no allegation that the plaintiff has expended anything on the faith of its alleged contract or in anticipation of its performance, nor is there any allegation that the plaintiff would have realized any profits, nor any allegation as to what it would have cost the plaintiff to perform its contract. There was nothing pleaded from which more than nominal damages could be implied. The only allegation touching damages was as follows:

"That the damages plaintiff will suffer if defendants prevent the performance of this contract depend upon many

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factors which are more or less indeterminate, and plaintiff's remedy in damages would be inadequate."

It may be remarked, in passing, that mere uncertainty in the measure of damages has been held insufficient ground to maintain an action to restrain a breach of contract. *Attorney General ex rel. Marr v. Board of Education of Detroit*, 133 Mich. 681, 95 N. W. 746. The complaint tendered no issue on the question of damages or the amount of damages occasioned by the failure of the respondents to enter into the contract, or by the refusal of the respondents to permit the appellant to perform the work. It is clear that the only cause of action stated or attempted to be stated in the complaint rested in facts going only to the right to injunctive relief. The appellant admits that any action for damages must be brought either against the state or against the county. Quoting again from its brief: "It is plaintiff's theory that the improvement of a permanent highway is state work, and that no liability arising out of a contract for such work can fall upon the county." It is then argued that, inasmuch as there is serious doubt as to whether the county or the state is the party in interest under the contract, and who would have to respond to any action for damages for breach of the plaintiff's alleged contract, therefore, the plaintiff's remedy was uncertain and inadequate by reason of the difficulty of determining whom to sue. Again it may be remarked that no such facts were pleaded, and the allegation that the appellant had no adequate remedy at law was a mere conclusion. *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Woodcock v. Guy*, 33 Wash. 234, 74 Pac. 358; *Silver v. Washington Inv. Co.*, 65 Wash. 541, 118 Pac. 748. The trial court, in dismissing the action, expressed the opinion that under the permanent highway act, the power of the county commissioners is simply supplemental to their ordinary functions with respect to public highways, and that the county would be the real party in interest as the defendant in an action for the breach of such a contract as that here in question, adding:

"But if there is any uncertainty as to the proper party defendant in any suit that may be brought for damages, the plaintiff was always aware of it, and cannot now amplify his remedy on that account.

"It may furthermore be observed that there is nothing in the subject matter of the contract that would ordinarily support an action for specific performance, or an injunction restraining the breach of it. Private parties contracting with each other with respect to the improvement of private property are remitted to their legal remedies, in case of a breach of the contract. The case at bar does not fall within any exception to the general rule."

With this clear statement of the attitude of the lower court upon its pleading, the nature of its remedy, and the necessity of either the state or the county as a party defendant to an action for damages, the plaintiff did not then request an amendment or offer to amend its complaint so as to state any facts showing actual damage or so as to bring before the court either the state, which the plaintiff believed the proper party to respond in damages, or the county, which the court evidently believed the proper party to respond in damages if any can be recovered. These considerations clearly distinguish this case from the situations presented in *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, and *Graff v. Tacoma*, 61 Wash. 186, 112 Pac. 250. Nor does the plaintiff now, in this court, ask that the cause be remanded for an amendment of the complaint and a trial of the question of damages. We again quote from its brief: "In conclusion, we submit that plaintiff is entitled to some remedy, and, there being no certain, adequate remedy at law, the injunction sought should be granted."

It is thus obvious that the plaintiff is still insisting upon injunctive relief. From what we have said, it is clear that no such relief, either preventive or mandatory, can be granted. That is the only question before us. It is not necessary, nor would it be proper, for us to decide the moot question as to who, if any one, should respond in damages for the failure of

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the commissioners to sign the contract and for their refusal to permit the appellant to do the work. That, so far as the case here presented is concerned, is a moot question wholly outside of the issues. Since the right to the injunctive relief—the only relief sought and the only relief which would ever have been possible under any view of the pleadings—has now ceased to exist, that question is also a moot question. The motion to dismiss the appeal must be granted.

It is so ordered.

Crow, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 11755. Department Two. June 6, 1914.]

WALLACE F. CHASE, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE. The driver of a team is guilty of contributory negligence, as a matter of law, in making a turn so short that the rear wheel of his wagon fell into an excavation for a sewer, where he had just been over the same route and made the turn in safety, the obstructions were in plain view, it was broad daylight, and that portion of the road was closed to travel.

SAME—NEGLIGENCE OF CITY—EVIDENCE—SUFFICIENCY. Negligence on the part of a city is not shown in allowing obstructions in part of a street that was in the course of repair and not open for travel, where the defects were open and apparent and a way was left open which was reasonably safe.

SAME—NOTICE OF DEFECT. Where, in improving a street, earth had been filled around a catch basin to the common level the day before, and it rained on the night preceding the accident, causing the earth to settle, so that the defect had existed but a few hours, the city is not liable for injuries thereby sustained by a traveler, in the absence of actual notice of the defect; since there was no constructive notice.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 24, 1913, in favor of the

¹Reported in 141 Pac. 180.

defendant notwithstanding the verdict of a jury in favor of the plaintiff, in an action for personal injuries sustained through defects in a street. Affirmed.

Tucker & Hyland, for appellant.

James E. Bradford and *Melvin S. Good*, for respondent.

FULLERTON, J.—The appellant brought this action against the city of Seattle to recover for personal injuries. At the trial, the jury returned a verdict in his favor for \$1,000. Subsequently the court, on the motion of the city, granted judgment notwithstanding the verdict. This appeal is from the judgment so entered.

At the time of the injury, the city was, through its contractor, constructing a sewer along Twelfth avenue northeast, a street within the city, with the usual and customary drains connecting therewith. The work had progressed to Fifty-sixth street, and at that point excavations had been sunk in Twelfth avenue northeast to the sewer level at convenient distances apart for tunneling between them. One such excavation had been sunk in the center of the street where it intersected Fifty-sixth street, and two more had been sunk south therefrom, the first some eighteen feet from the first mentioned excavation, and the other some sixteen feet from the last. Catch basins were placed at the corners of the streets, and drains therefrom connected with the sewer. It was the policy of the city to leave a passageway for vehicles along the street while the work of the sewer was in progress, and for that purpose the earth taken from the excavations was thrown on the street to the east of the excavations, and the earth from the catch basins on the margin of the streets in such a way as not to obstruct the passageway. The catch basin at the southwest corner of the junction of streets named had been inserted just prior to the time of the injury, and the excavation left surrounding it filled with earth. A rain had fallen the night before, which caused this earth to settle somewhat, leaving the top of the fill some twelve inches, as es-

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timated by one witness, and eight inches, as measured by another, below the common level of the street.

On the day of the injury, the appellant hauled a load of wood to a customer of his employer who lived in the vicinity of the street being improved. His course took him north along the west side of Twelfth avenue southeast, until he reached Fifty-sixth street, where he turned west on that street. In going with the load, he made the turn with safety, although he says he was obliged to drive his team over a pile of dirt thrown up in the street from an excavation for a catch basin. On his return with the empty wagon, he passed over the same course, but seems, on reaching the turn, not to have made any allowance for the swing of the team which he found necessary on his outward course, but turned abruptly into the cross street. The result was that the hind wheel of the wagon passed over the depression on making the turn, which, together with the cramped position of the wagon, caused some "convulsion of the wagon," which threw him from the seat of the wagon to the ground, causing his injuries. The wagon was an ordinary wagon used for hauling wood and coal, with a double box, having a seat at its front end high enough above the box to be out of the way of the load. The appellant testified that he did not see the depression while passing either way, being intent on keeping the team out of the excavations sunk for the purpose of laying the sewer pipe. The accident happened between five and six o'clock in the afternoon, in the full light of day.

It is, undoubtedly, the rule, as the appellant contends, that the use of a public highway by a person having knowledge of its defective and dangerous condition does not, of itself, constitute contributory negligence, but it is equally the rule that such knowledge requires increased caution on the part of the person so using it, and he is guilty of contributory negligence if he does not use caution commensurate with the apparent or known dangers. Here we think it plain that the appellant did not use the requisite care. His first trip over

the way made it known to him, according to his own admission, that the turn from the one street into the other could not be made with the team and wagon he was driving so as to keep the wheels of the wagon in the traveled way unless the team was swung somewhat out of the beaten path; in other words, he knew that, if the team was driven directly in the traveled part of the way around the turn, the back wheels of the wagon, at least, would drift to the side of the way. Common prudence dictated that he should have looked to see what was in the way, and failure to do so was negligence sufficient to bar a recovery from an injury happening because thereof.

There was, moreover, no evidence of negligence on the part of the city. The street was in the course of repair, not open for travel throughout its entire width, but in part only,—facts apparent to any one who approached it. The defect or obstruction into which the appellant drove his wagon was on the part of the street being improved, the part not open for travel, was in no manner concealed, but open and apparent to any one passing along the street. On the other hand, the way left open was reasonably safe for travel, and any one confining himself to this way could pass with safety. Under these circumstances, it is difficult to see wherein the city did not perform its full duty. We think it did, and so hold.

Again, to charge a city with liability for a defect such as the one shown here, even had it been in the way left open for travel, it must be shown that the city either had actual notice of the defect, or that it had existed for such a length of time as to charge it with constructive notice thereof. The evidence on this branch of the case is that the earth had been filled in around the catch basin to the common level the day before, or at most two days before, the accident. That it had rained on the night preceding the accident, and that the defect was caused by the settling of the earth in the fill. The defect, therefore, had existed but a few hours before the accident. There is no evidence that the city had actual notice of the defect, and no special circumstance is shown, other than the

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mere lapse of time, why it should be charged with constructive notice; and the time elapsing, we think, was too short for that purpose.

The judgment is affirmed.

CROW, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

[No. 12026. Department Two. June 6, 1914.]

E. T. PYBUS, *Appellant*, v. HANS J. SMITH, *as City Clerk*,
Respondent.¹

MUNICIPAL CORPORATIONS — OFFICERS — RECALL — GROUNDS — "MALFEASANCE" — TRADING VOTES IN COUNCIL. It is "malfeasance" in office, within the meaning of 3 Rem. & Bal. Code, § 4940-1 *et seq.*, authorizing the recall of city officers, for councilmen to make an agreement for the trading of votes whereby each yielded his personal judgment in voting on certain appointments and matters in consideration of the promise of votes on other matters of special interest to him.

Appeal from a judgment of the superior court for Chelan county, Pendergast, J., entered April 16, 1914, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. Affirmed.

Williams & Corbin, for appellant.

Fred Kemp and *E. L. Baker*, for respondent.

Whitney & Hughes and *Sam R. Sumner*, for intervener.

PARKER, J.—The plaintiff, a councilman of the city of Wenatchee, seeks to have the defendant, as city clerk of that city, enjoined from calling a special election submitting to the voters the question of recalling and discharging the plaintiff from the office of councilman. The defendant demurred to the plaintiff's complaint upon the ground, among others, that it did not state facts sufficient to entitle the plaintiff to the relief prayed for. The demurrer being, by the court, sus-

¹Reported in 141 Pac. 203.

tained upon this ground, the plaintiff elected to stand upon his complaint and not plead further. Thereupon, judgment of dismissal was entered accordingly. From this disposition of the cause, the plaintiff has appealed.

Attached to the complaint as an exhibit, and made a part thereof, is a copy of the charge made against appellant by the voters who demand his recall and discharge. Petitions for appellant's recall and discharge, containing a synopsis of this charge, having been signed by the requisite number of voters, respondent, as city clerk, being about to call a special election in pursuance of our constitutional and statutory recall provisions, this action was commenced, seeking to enjoin him from so doing. Appellant's principal contention is that the charge made against him by the voters who demand his recall is not sufficient in law to warrant his recall and discharge from office and, therefore, do not constitute legal cause for the calling of an election to vote upon that question. It is alleged in the charge made against appellant, in substance, after stating in some detail various matters pending before the city council, that he specially desired certain action to be taken by the city council in certain of these pending matters; that other councilmen especially desired certain action to be taken by the city council in certain others of these pending matters; and:

"That said E. T. Pybus and said councilmen Zener, Hines and Wilson, each well knowing said facts as above alleged, and while in office as said councilmen, on or about the 6th day of January, 1914, and for the sole purpose of carrying out their respective wishes in the premises and preventing said matters and appointments from being fairly and impartially determined by said councilmen, solely on the merits thereof according to the best and uninfluenced judgment of said several councilmen, did wilfully, knowingly, intentionally and unlawfully conspire together and mutually enter into an improper, unlawful and corrupt understanding and agreement to cast their several votes on said propositions as follows, to wit:

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"E. T. Pybus agreed to cast his vote to reject the appointment of N. Inscho as chief of police and in consideration therefor, W. R. Wilson agreed to cast his vote in support of and to adopt the said proposed Sunday closing ordinance.

"E. T. Pybus further agreed to cast his vote to reject the confirmation of F. M. Berry as city engineer and in consideration therefor C. A. Hines agreed to cast his vote in support of and for the adoption of said proposed Sunday closing ordinance; all of said parties agreed with each other that said several propositions should be voted upon by them and each of them alike and in the following manner, that is that they would each vote to reject the appointment of N. Inscho as chief of police, to reject the appointment of F. M. Berry as city engineer, and to adopt and pass the Sunday closing ordinance, and to confirm the appointment of one W. W. Gideon (the father-in-law of said councilman C. R. Zener) as chief of police if the mayor of said city could be prevailed upon to appoint said Gideon to said position."

This is followed by an allegation that the agreement between the appellant and the other councilmen was carried out by each voting in accordance with the agreement. There is no allegation, however, that appellant or any of the other councilmen was to receive or did receive, any personal benefit. The allegations of the charge are, in substance, simply that appellant yielded his personal judgment in voting upon the matters he was not specially desirous of having decided in any particular way, solely in consideration of, and to the end that the matter he was specially desirous of having decided in a particular way should be so decided by the council.

Our statute making effective the recall provisions of the constitution provides that when any voter or voters desire to demand the recall and discharge of any elective officer, "he or they shall prepare a typewritten charge, reciting that such officer, naming him and giving the title of his office, has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office . . . which charge shall state the act or acts complained of in concise language, without unnecessary repetition . . ." Laws of 1913, p. 454 (3 Rem.

& Bal. Code, § 4940-1 *et seq.*). We have no constitutional or statutory definition of the words "malfeasance" or "misfeasance," as here used. The controlling question here presented is, Is this alleged corrupt agreement, made between appellant and the other councilmen, and the carrying of it out by them, an act of malfeasance within the meaning of that term, as used in this act and the constitution? The only decision called to our notice which seems to be directly in point is that of the general court of Virginia, rendered in 1825, in *Commonwealth v. Callaghan and Holloway*, 2 Virginia Cases 460. In that case, there was involved the question of the sufficiency of an information charging John Callaghan and John Holloway, two magistrates, whose official duty required them to vote upon the choosing of a revenue commissioner and a clerk of their court with making and carrying out an unlawful agreement as to how each should vote. It was charged:

"That at a court held for the county of Alleghany, there was an election for the office of Commissioner of the Revenue, and of clerk of said court, when the Defendants were both present, and acting in their official character as Magistrates, in voting in said election; that the Defendant *Callaghan*, in said election for Commissioner of the Revenue, wickedly and corruptly agreed to vote, and, in pursuance of said corrupt agreement, did vote for a certain *W. G. Holloway*, to be said Commissioner, in consideration of the promise of the Defendant *Holloway*, that he would vote for a certain *Oliver Callaghan* to be Clerk of said Court; and that the Defendant *Holloway* in the said election of Clerk, wickedly and corruptly agreed to vote, and in pursuance of said corrupt agreement, did vote for a certain *Oliver Callaghan* to be said Clerk, in consideration of the promise of the Defendant *Callaghan*, that he would vote for the aforesaid *W. G. Holloway*, to be Commissioner."

The charge was held to be sufficient as charging the defendants with the commission of a misdemeanor at the common law, the court observing:

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"The Defendants were Justices of the Peace, and as such, held an office of high trust and confidence: In that character, they were called upon to vote for others, for offices, also implying trust and confidence: Their duty required them to vote in reference only to the merit and qualifications of the officers; and yet upon the pleadings in this Case, it appears, that they wickedly and corruptly violated their duty, and betrayed the confidence reposed in them, by voting under the influence of a corrupt bargain, or reciprocal promise, by which they had come under a reciprocal obligation to vote respectively for a particular person, no matter how inferior the qualifications to their competitors. It would seem, then, upon these general principles, that the offence in the information is indictable at Common Law. But, there are authorities which apply particularly to the case of justices. In 1 *Bl. Com.* 354, n. 17, *Christian*; it is said, if a Magistrate abuse his authority from corrupt motives, he is punishable criminally by Indictment or Information.

"Again, where magistrates have acted partially, maliciously or corruptly, they are liable to an Indictment. 1 *Term Rep.* 692; 1 *Burr.* 556; 3 *Burr.* 1317, 1716, 1786; 1 *Wils.* 7. An instance of their acting partially, is that of their refusing a license from motives of partiality, the form of the Indictment for which is given in 2 *Chitty's Crim. Law*, 253.

"We are then of opinion, for the reasons, and upon the authorities aforesaid, that the offence stated in the Information is a misdemeanor at Common Law, for which an information will lie, but that it is not within the Statute referred to."

The court evidently regarded the defendants free from guilt of the more serious statutory offense sought to be charged, because they were not charged with acting in consideration of personal gain to themselves. But that did not free them from guilt of misdemeanor if the charge be proven true. Whether this appellant could be convicted of a misdemeanor in our state upon the charge here made may be regarded as somewhat doubtful. But we are, however, of the opinion that the facts here charged against the appellant, if true, do constitute malfeasance in office on his part, within the meaning of that word as used in our constitutional and

statutory recall provisions, and form sufficient legal cause for submitting to the voters of the city the question of his recall and discharge from public office. The following authorities lend some support to this view, though we do not cite them as being directly in point: *Minkler v. State ex rel. Smithers*, 14 Neb. 181, 15 N. W. 330; *State ex rel. Tilley v. Slover*, 113 Mo. 202, 20 S. W. 788; *Bradford v. Territory ex rel. Woods*, 2 Okl. 228, 37 Pac. 1061; *Mechem, Public Officers*, § 458. In the text of 9 Cyc. 485, touching the illegality of contracts which tend to interfere with the proper administration of government, the learned editors say:

“A people can have no higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments. It is therefore a principle of the common law that it will not lend its aid to enforce a contract to do an act which tends to corrupt or contaminate, by improper and sinister influences, the integrity of our social or political institutions. Public officers should act from high consideration of public duty, and hence every agreement whose tendency or object is to sully the purity or mislead the judgments of those to whom the high trust is confided is condemned by the courts. The officer may be an executive, administrative, legislative, or judicial officer. The principle is the same in either case.”

Other questions presented in the briefs of counsel do not call for discussion, in view of the conclusion we have reached.

The judgment is affirmed.

Crow, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

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[No. 11606. Department One. June 8, 1914.]

JAMES H. DOUGLAS *et al.*, Respondents, v. TITLE TRUST
COMPANY, Appellant.¹

ABSTRACTS OF TITLE—CERTIFICATE—OMISSIONS—LIABILITY. An abstract company, certifying to the title to property, between specified dates, that no proceedings affecting the title to the property had been had in the state or Federal courts affecting the title during such time, is not liable for failure to notice interlocutory proceedings had in an action commenced before, and judgment entered after, the limit of the certificate, such as hearings and continuances which did not operate as a lien upon or affect the title to the land.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 22, 1913, upon findings in favor of the plaintiff, in an action for damages for breach of contract. Reversed.

Peters & Powell and *Herr, Bayley & Wilson*, for appellant.

Douglas, Lane & Douglas and *Kerr & McCord*, for respondents.

CHADWICK, J.—We have before us an abstract of title with four certificates. The first certificate was made on the 11th day of August, 1911. It shows Ordinance No. 19,426, of the city of Seattle, condemning a part of the property covered by the abstract for street purposes, and directing the city attorney to begin suit to carry the ordinance into effect. This ordinance was passed October 26, 1908, and approved November 5, 1908. Suit was begun on the 30th day of December, 1908. The abstract was continued and certified on August 26, 1911, and on April 25, 1912, by another abstract company. The beginning or the pendency of the suit was not shown in any of these continuations. In April, 1912, plaintiffs negotiated for an exchange of properties with the then owner of the property. They handed the abstract, with

¹Reported in 141 Pac. 177.

its several certificates, to defendant, and on June 13, 1912, the abstract was returned with a certificate purporting to cover the period between the 15th day of April, 1912, and the 18th day of June, 1912. A file in the auditor's office was noted and the certificate continues:

"and further certifies that since said date there have been no proceedings affecting the title to said property had in the superior court of the state of Washington, in and for said county, or in the federal courts heretofore or now holding terms in said county."

Douglas, Lane & Douglas, attorneys at law, of which firm plaintiff James H. Douglas is a member, certified to the state of the title, saying:

"(5) Ordinance No. 19,426 of the city of Seattle shown at page 18 of the abstract, provides for the laying off, opening, etc., of North and East 80th street, and describes a tract of land 60 feet in width over which said street is to be extended, being thirty feet in width on each side of a center line therein described. The thirty feet excepted from the tract in question is probably intended to be the strip over which this street is to be opened, but from the description we cannot say that it exactly corresponds. The abstract does not show that any condemnation proceedings have been instituted."

Plaintiffs thereupon bought the property. Pursuant to intervening proceedings and adjournments, an assessment to pay for the opening of the street was confirmed in the superior court on August 17, 1912. Plaintiffs thereafter paid the full amount thereof, and have brought this action to recover the amount so paid.

It is admitted that suit was begun under Ordinance No. 19,426 on the 30th day of December, 1908, and that other proceedings were had in the order and upon the dates following:

December 30, 1908—Petition in condemnation filed.

Sept., 1910—Cause tried and verdict rendered.

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Apr. 7, 1911—Order of court referring matter to Board of Eminent Domain Commissioners to prepare assessment roll.

March 16, 1912—Assessment roll filed, and hearing set for April 25, 1912.

Apr. 25, 1912—Hearing on roll continued to Apr. 29th.

Apr. 29, 1912—Hearing on roll continued to June 6th.

June 6, 1912—Hearing had and assessment roll taken under advisement.

June 15, 1912—Court makes changes and orders Board to recast roll.

July 16, 1912—Re-assessment roll filed and set for hearing on August 12, 1912.

Aug. 13, 1912—Roll confirmed.

None of these items were shown in the abstract or in the continuations. Those occurring between the dates embraced in defendant's certificates are italicized. The court found for the plaintiffs, and from the judgment entered on the findings, defendant has appealed.

Plaintiffs rely entirely upon the last certificate of the abstracters. We held, in the case of *Bremerton Development Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69, that an abstracter is liable, as for a breach of contract, and not in tort, for damages resulting from his negligence. The contract of the defendant, as evidenced by the certificate, was to continue the abstract from the 12th day of April, 1912, to the 12th day of June, 1912, and by the same token, the abstracter assumed to abstract only such records and proceedings between these dates as affected the title to the property. The suit was begun before, and the judgment entered after, the time limit of the certificate. There is, consequently, but one question in this case. Are the continuations entered and the hearing had in the condemnation suit, "proceedings affecting the title" necessary to be abstracted? We think not. The rule is that, when an abstract is prepared to cover only a limited period, it need not include anything of record outside of such period. 1 Cyc. 214; *Wakefield v. Chowen*, 26

Minn. 379, 4 N. W. 618. Therefore, it was not incumbent on the last abstractor to note the filing of the suit or the assessment roll. We do not understand that an abstractor is bound to notice any order, proceedings, or record unless they in fact affect the title. In the abstract of a suit or action begun and pending in a court, it is only such matters as go to the jurisdiction; as may serve as a *lis pendens*; which operate as a lien upon property; command or deny, by way of judgment or decree, some act on the part of those who have a real or apparent interest in the property; that affect or touch the title.

The time of a hearing, or the trial itself, will not, in the absence of some special showing not made here, affect or touch the title. Such orders are interlocutory and incident to every lawsuit, and to include them would generally result in the imposition of unnecessary costs to the purchaser of an abstract.

Appellant cites and relies on certain cases. We do not agree with them in the main and will not refer to them. Counsel for respondent also cites many authorities going to the admitted proposition that all instruments affecting or touching the title should be abstracted. They also rely on the *Bremerton Development Co. v. Title Trust Co.* case. That case is to be distinguished from the one at bar in this, that the liability of the abstract company was held to rest not upon the one, but upon the several certificates. The abstractor also certified that the taxes and special assessments, if any were shown by a previous certificate, were not referred to unless some change had occurred. The court said:

"By this certificate, an examiner of the title was directly referred to the previous tax searches and certificates to ascertain existing liens, and he would be justified in concluding that no assessment liens existed other than those thus disclosed. It is apparent that the form of certificate used was adopted by appellant to avoid the necessity of repeating assessment liens disclosed by previous searches and still existing. By reference and adoption, the former certificates thus

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became part and parcel of the later certificate made for respondent. The simple facts are that, in previous tax searches and certificates, the appellant failed to disclose the assessment lien; that the last tax search and certificate made for respondent, by reference to the previous ones, repeated, continued, and extended that omission."

The certificate relied on in the case at bar makes no such reference or adoption.

The judgment of the lower court is reversed, and the case remanded with instructions to dismiss.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

[No. 11624. Department Two. June 10, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER MILLER,
Appellant.¹

CRIMINAL LAW—APPEAL—REVIEW—DISCRETION—CONTINUANCE. The denial of a continuance in a criminal trial, asked because of insufficient time to prepare a defense and because of prejudice of the panel of jurors in attendance, will not be disturbed on appeal where abuse of discretion was not shown.

SAME—TRIAL—CONDUCT—SPECIAL COUNSEL. It is discretionary to allow special counsel to aid the prosecuting attorney in a criminal trial.

SAME—TRIAL—INDORSEMENT OF WITNESS. It is not error to allow the state to indorse upon the information the name of an additional witness, where no continuance was asked.

PERJURY—OATH—EVIDENCE. In a prosecution for perjury in giving testimony at a former trial, evidence of the clerk that there was no doubt that he administered the oath to the defendant on the former trial, and of the presiding judge that it was his best judgment that the usual oath was administered to him, is sufficient to go to the jury on the question whether his evidence was given under oath.

PERJURY—EVIDENCE—SUFFICIENCY—WITNESSES—REFRESHING MEMORY. In a prosecution for perjury in giving testimony, the testimony alleged to be false may be proved by the judge, who recalled it, and

¹Reported in 141 Pac. 293.

by the stenographer, who testified that his notes were correct and was allowed to refresh his memory therefrom.

CRIMINAL LAW—EVIDENCE—IDENTITY OF ACCUSED—SUFFICIENCY. In a prosecution under the habitual criminal act, upon an issue as to the identity of accused and a person of the same name convicted and sentenced to the state penitentiary in New York, the evidence is sufficient where the Bertillon clerk of such prison testified that he was well acquainted with a person of the same name imprisoned in such prison at that time, and that he and the accused were one and the same person, taken in connection with photographs and handwriting; the rule being that identity of names raises a presumption of identity of persons, where there is a similarity of residence, trade, or circumstances.

WITNESSES—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT. The fact that letters were written to an attorney does not show that the communications were privileged, where the relation of attorney and client did not exist.

WITNESSES—EXPERTS—OPINIONS—HANDWRITING. An attorney who is familiar with the handwriting of a person may testify that certain signatures were in such person's handwriting.

PERJURY—EVIDENCE—CORROBORATION—SUFFICIENCY. In a prosecution for perjury, the requirement that there must be direct testimony of at least one credible witness directly contradictory to the defendant's oath, in addition to which there must be corroboration by another such witness or circumstances established by independent evidence, the evidence of a witness contradicting defendant's oath, that he and a person convicted and sentenced for a prior offense are one and the same person, are sufficiently corroborated by the record of the judgment and sentence and prison records.

NEW TRIAL—SURPRISE—NEWLY DISCOVERED EVIDENCE. A new trial on the ground of surprise and newly discovered evidence in a criminal trial cannot be claimed where it appears that, on a prosecution three years previously, while represented by the same attorney, the alleged newly discovered evidence was produced and used by the defendant upon a similar issue, which he was informed by the information would be again used against him on the trial; since no reasonable diligence was used to produce the evidence at the trial.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered May 21, 1913, upon a trial and conviction of perjury. Affirmed.

Joseph M. Glasgow, for appellant.

John F. Murphy and *Everett C. Ellis*, for respondent.

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Opinion Per MORRIS, J.

MORRIS, J.—Appeal from a judgment of guilt upon an information charging appellant with the crime of perjury. The information, in due form, charged that appellant, in a certain cause in which the inquiry was material, did, upon his oath, falsely testify that he had never been convicted of a felony except on one occasion at Seattle; whereas in truth he had been convicted of a felony in the county and state of New York on December 26, 1894, and in the county of Cook and state of Illinois, on February 23, 1907. Appellant presents thirty-seven assignments of error, under eight heads.

(1) The cause came on for trial on February 17, 1913, when appellant, through his counsel, moved for a continuance until some time in the following March. The grounds for the motion were principally that counsel for appellant had not had sufficient time to prepare a defense and that the panel of jurors then in attendance was prejudiced against appellant, because of his previous conviction during the same month on another charge. The motion was denied. There is nothing in the showing made upon this motion from which it appears that the lower court abused its discretion in denying the continuance, and no error is found.

(2) Appellant moved the court to exclude Everett C. Ellis, of counsel for the state, from participating in the trial. We find no error in the denial of this motion. The statement of facts recites that Mr. Ellis was a deputy prosecuting attorney for Pierce county. Whether he was or not, it is within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the trial of a criminal case. *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386.

(3) On the day of the trial, the state was permitted to endorse the name of J. L. Barck upon the information as a witness for the state. This does not of itself constitute error. The most that appellant could get out of the act of the state would be a continuance, which was not asked for upon this ground. *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27.

(4) Under this assignment, appellant contends there was no competent evidence to show that an oath was properly administered, or that he was under oath when giving the testimony upon which the perjury charge was based. The clerk in attendance upon the former trial testified that, at that time, he was a duly qualified clerk of the court. We shall not attempt to set out all his testimony on this point. He sums it up by saying: "I should say there was no question in regard to it; that it was me that administered the oath." The judge who presided at the former trial was produced as a witness by the state, and gave it as his best judgment that the usual oath was administered to the appellant by the deputy clerk then in attendance upon his court. Without further reference, we find nothing to sustain this assignment. The evidence being competent upon the point to which it was directed, its sufficiency was for the jury.

(5) The next assignments go to the proof of appellant's testimony which was alleged to be false. This was established by the testimony of the presiding judge who recalled it. The stenographer who had taken notes of the testimony was also produced, and after testifying that his notes were correct, he was permitted to refresh his memory of appellant's testimony from his shorthand notes. This was permissible. *Kellogg v. Scheuerman*, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237; *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.

(6) Under this assignment, appellant attacks the sufficiency of the proof of the former convictions, and alleges error in its reception in several particulars. To prove the New York conviction, the state introduced a certified copy of the record of the court of general sessions of the city and county of New York, showing on December 26, 1894, a conviction of Frederick Miller of the crime of burglary in the second degree, upon which he was sentenced to a term of ten years in the state's prison. Norman R. Burdick then testified that he was Bertillon clerk in Clinton state prison, Dannamora,

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New York, and had been connected with such prison since 1896; that he well knew Frederick Miller from 1897 to 1900, during which time Miller was a convict in such prison; that the Frederick Miller he then knew and the appellant were the same person. In connection with this testimony, the state introduced a photograph of Frederick Miller, taken from the records of Clinton state prison. The signature of Frederick Miller as it appeared in a record of Clinton state prison was also identified as the handwriting of the appellant. The state also introduced the signature of the appellant as it appeared to a plea of former jeopardy, and two signatures taken from letters written to T. D. Page. These various signatures were testified to as written by the same person.

Two objections are made to this line of testimony. First, that there is nothing to connect the Frederick Miller named in the record of conviction with the Frederick Miller in Clinton state prison. The identity of the appellant with the person named in the record of the New York conviction and the person imprisoned in Clinton state prison was a question of fact for the jury. In *State v. Lashus*, 79 Me. 504, 11 Atl. 180, it is said, in disposing of a like question: "The identity of names is some evidence of identity of person, more or less potent according to the connecting circumstances." In *State v. Kelsoe*, 11 Mo. App. 91; *Id.*, 76 Mo. 505, in admitting the record as evidence of former conviction, it is said that the record of a conviction of one of the same name raises a presumption that it was the same person. We held in *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. 877, that identity of name is *prima facie* evidence of identity of person. This rule is well established. *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *State v. Griffie*, 118 Mo. 188, 23 S. W. 878; *Rupert v. Penner*, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824, and notes; *State v. Smith*, 129 Iowa 709, 106 N. W. 187, 4 L. R. A. (N. S.) 539, and notes. Lawson on Presumptive Evidence, p. 307, says that identity of name raises a presumption of identity of person, where there is a

similarity of residence, trade, or circumstance. Under such restriction, the rule would apply, for here there was a similarity of residence and circumstance in the confinement in a state prison within the term of the sentence. A second objection was to the testimony of T. D. Page, an attorney, who testified that he was familiar with the handwriting of appellant, and that two signatures of "Peter Miller" appearing on two slips of paper were in the handwriting of appellant. Counsel for appellant drew out the fact that these signatures were appended to two letters written to the witness by appellant. The objection was then made that the signatures were parts of a privileged communication. There is nothing to show that the relation of attorney and client existed between Page and appellant, or that the communication falls within the rule of privilege. Because a man happens to be an attorney, it does not follow that every letter he receives is a privileged communication. In any view of the situation, the testimony was competent. *Thompson v. Perkins*, 39 App. Div. 656, 57 N. Y. Supp. 810; *Gower v. Emery*, 18 Me. 79.

It is also said that Page was not shown to be competent to testify to Miller's handwriting. The witness testified to a familiarity with the handwriting of appellant, and that was all that was necessary to render his testimony admissible. *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241.

To prove the Illinois conviction, the state introduced certified records of the criminal court of Cook county, showing an indictment of H. Braun on October 21, 1907, for the crime of burglary, and the transfer of the cause, on January 7, 1907, to the municipal court of Chicago for trial, and conviction and sentence to the state penitentiary at Joliet for a term of years not exceeding the maximum term provided by law for the punishment of such crime. To this was added the testimony of W. W. Howe, who testified that he was connected with the police department of Chicago, and had been for twenty-four years; that he made the arrest of H. Braun in connection with the above indictment, was present at his trial

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and conviction, and afterwards saw him while an inmate of the state penitentiary at Joliet. He also produced a photograph of H. Braun as a true likeness of him at the time he was so confined under such conviction and sentence, and then identified H. Braun and the appellant as one and the same person. The state also introduced a photograph of the appellant as he appeared at the time of his arrest at Seattle in July, 1909. It is now urged that the judgment appealed from cannot be sustained under the rule announced in *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123, that to sustain a conviction for perjury there must be direct testimony of at least one credible witness directly contradictory of the defendant's oath, in addition to which there must be either another such witness or corroborating circumstances established by independent evidence of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. The record as we have recited it contains sufficient corroborating proof of the New York and Illinois convictions, and meets this rule.

(7) This assignment goes to the sufficiency of the evidence in overruling a motion for a directed verdict. It has been disposed of by what has already been said.

(8) The last assignment is error in denying a new trial, based chiefly upon the ground of surprise and newly discovered evidence. In support of this motion, counsel for appellant presented to the lower court, at the hearing of the motion, a certified copy of the record in the case of *People v. Braun*, above referred to, reciting that, on November 5, 1907, the judgment against Braun was vacated by the municipal court of the city of Chicago upon the ground that such court had no jurisdiction to enter judgment of confinement in the state penitentiary, and the cause was re-transferred to the criminal court of Cook county, where the defendant was permitted to withdraw his plea of not guilty and enter a plea of guilty of petit larceny, upon which plea he was sentenced to ten months' imprisonment in the house of correction in

the city of Chicago. This assignment cannot be sustained upon the ground of surprise or newly discovered evidence. The record shows that, in January, 1910, another criminal action was pending against appellant in the superior court of Pierce county; that the same counsel who represents him in the defense of this action represented him in the defense of that action; that, in support of a motion for a new trial in that cause, counsel for appellant filed his own affidavit in which it appears, referring to a photograph published in the Tacoma Ledger purporting to be the photograph of H. Braun, taken at the state penitentiary at Joliet, in February, 1907, that in February, 1907, Braun, upon a charge of burglary, was convicted and sentenced to ten years in the state penitentiary at Joliet (the same conviction proved by the state in this cause); that he was subsequently released on a writ, and the conviction and sentence set aside on February 4, 1907, and that on November 9, 1907, Braun entered a plea of guilty of petit larceny, and was sentenced to ten months in the house of correction. These are the facts upon which he now relies as newly discovered evidence, and to sustain his surprise at the state proving the conviction. In the face of such a record, we cannot see how it can now be said that counsel for appellant was surprised. He was informed by the state in its information that it relied upon showing the Illinois conviction of appellant under the name of H. Braun in support of the charge of perjury, and counsel's affidavit made and filed three years prior to this trial shows that he was then informed of the facts upon which he now relies as establishing his plea of surprise and newly discovered evidence. With such facts before him, whether his client was or was not H. Braun, ordinary diligence would have put him in full possession of all the facts set forth as newly discovered evidence. Appellant fails to show, in view of these facts, that the evidence upon which he relies in support of his motion for a new trial could not, with reasonable diligence, have been discovered and produced at the trial; and

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Statement of Case.

failing to so show, the court was justified in denying a new trial upon such grounds. *State v. Vance*, 29 Wash. 485, 70 Pac. 84.

All the several assignments of error made by the appellant have been duly considered. Not finding any error which demands a reversal of this judgment, it is affirmed.

FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 11902. Department Two. June 18, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v. HENRY R. ALLEN,
Respondent.¹

STATUTES—SUBJECTS AND TITLES. The determination of what acts shall be prohibited as detrimental to the protection of game fish, and making the use of nets in fresh waters a nuisance, is within the purview of the title of the game code of 1913, Laws 1913, p. 356, defined, in part, as an act for the protection of game fish.

FISH—PROTECTION AND REGULATION—USE OF NETS—STATUTES—IN *PARI MATERIA*—IMPLIED REPEAL—CONSTRUCTION. The legislature, in enacting the game code of 1913 (3 Rem. & Bal. Code, § 5395-1 *et seq.*), for the protection of game fish, had power to prohibit, by Id., § 5395-46, the use of nets in fresh water above tide water as a nuisance; and having done so in clear language, the act of 1909 (2 Rem. & Bal. Code, § 5183), relating to the protection of food fish, and permitting the use of nets for the taking of salmon for food in all waters, must give way in so far as it conflicts with the game code; the two statutes being in *pari materia*, and to be construed together.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered March 3, 1914, upon sustaining a demurrer to the information, dismissing a prosecution for the illegal taking of fish. Reversed.

R. A. Lathrop, for appellant.

T. P. Fisk, for respondent.

¹Reported in 141 Pac. 292.

MORRIS, J.—Appeal by the state from a judgment dismissing an information, upon the sustaining of a demurrer and the refusal to further plead. The information charged that the respondent did wilfully and unlawfully use a fish net for catching fish in the Skokomish river at a point two miles above tide water, the said Skokomish river being a body of fresh water. Thereafter a stipulation was filed, whereby it was agreed that, for the purpose of the demurrer, the court should accept as a fact that the respondent, at the time and place indicated in the information, was using a salmon net, fishing for salmon for his own use. The information was drawn under § 46, ch. 120, Laws 1913, p. 378 (3 Rem. & Bal. Code, § 5395-46), reading:

“Nets of any description being used in any of the fresh waters of this state above tide water are hereby declared and are a public nuisance, and it shall be the duty of all county game commissioners, game wardens and their deputies, police officers and constables without warrant or process, to take, seize, abet and destroy any and all of the same. And any person using same shall be guilty of a misdemeanor. The game wardens and their deputies, sheriffs, and their deputies, police officers, and constables shall seize any and all nets and seines when illegally used and all game fish taken therewith and at once report the seizure to the county game commission or game warden. Every person using, aiding or abetting the use of any such nets or other devices contrary to the provisions of this section shall be guilty of a misdemeanor.”

This chapter is known as the game code, and, so far as it relates to fish is an act relating to the protection and propagation of game fish. Chapter 77, Laws of 1909, p. 143, is an act relating to the protection and propagation of food fish, and § 1 of this act, being Rem. & Bal. Code, § 5183 (P. C. 191 § 63), contains a proviso, “that nothing in this act or any other act shall prevent any person residing in this state from taking salmon or other fish by any means at any time for consumption by himself and family.” Under this proviso, respondent contends that the right is given to take salmon or other food fish from any of the waters of this state

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by any means and at any time; and that, as the information accepts the fact that respondent was using a salmon net to take salmon for his own use, his act could not be charged as a nuisance under § 46 (*Id.*, § 5395-46).

It must be accepted that the act of 1913 is purely a game fish statute, and that each of its provisions, so far as it relates to fish, must be read as applying to game fish. It must also be conceded that the legislature not only has the power to regulate and control fishing in the public waters of the state, but that its power extends to the right of declaring what is harmful and detrimental to the protection, preservation, and propagation of fish, and that within that power it may declare the use of nets at specified times and places to be a public nuisance. The act of 1913 (p. 356) defines itself in part as an act for the protection of game fish. It is certainly within the purview of such an act for the legislature to determine what acts should be prohibited as detrimental to the protection of game fish, and to declare that the use of nets of any description in any of the fresh waters of this state above tide water should be regarded as a public nuisance. The fresh waters of this state above tide water are where the game fish abound, and in laws regulating fishing in such waters one would naturally look for regulation as to the use of nets or any other means that might be regarded by the legislature as necessary or proper for the protection of game fish. Hence, we find other sections of this same act relating to the time, manner, size and limit of catch, and prohibiting the employment or use of certain other means with intent to take game fish.

There being then no question as to the right of the legislature to declare what shall be a nuisance in so far as it may affect game fish, and § 46 (*Id.*, § 5395-46) declaring the use of nets in fresh water above tide water to be a nuisance, being germane to and within the purview of the act and its title, there remains to determine only what the legislature means in the enactment of this section, and this is best answered by

a reading of the section. There is nothing ambiguous or obscure in the language chosen or the purpose indicated. The section is a plain, concise statement of an intent included within a power to declare the use of nets at the places named detrimental to game fish, and prohibit such use as a nuisance. Section 5183 (P. C. 191 § 63), in so far as it conflicts with § 46 (Id., § 5395-46), must give way, and must be held as permitting the use of nets for the taking of salmon for food except in fresh water streams above tide water. True, salmon is not a game fish, and a game fish statute would hardly be the place in which to look for a regulation regarding salmon fishing. But § 46 (Id., § 5395-46), is not intended as a regulation of salmon fishing. Its only intent is the enactment of a specific regulation deemed necessary for the protection of game fish, and if such named regulation prohibits any act which was theretofore permissible in the taking of salmon, no other construction can be given than that the permissive use of the former act is curtailed by the regulation in the latter act; not as an intended regulation of the taking of food fish in a statute dealing only with game fish, but as a regulation deemed necessary for the protection of game fish. These statutes, in so far as they refer to the use of nets and the taking of fish in the fresh waters of this state above tide water, the first as including nets within the phrase "by any means," and the second by specific reference, are *in pari materia*, and are to be construed together as parts of the law regulating the use of nets in the fresh waters of the state above tide water. And as so construed, it being within the power of the legislature to declare that to be a nuisance in the latter act which was permissible under the former act, the latter act must be regarded as a restriction upon the use of nets, or as a modification of the original permissive use as applied to new conditions and circumstances, and as such must be held controlling.

The judgment is therefore reversed.

FULLERTON, MOUNT, and PARKER, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 11703. Department Two. June 20, 1914.]

M. L. COOVERT *et al.*, Respondents, v. SPOKANE, PORTLAND
AND SEATTLE RAILWAY COMPANY, Appellant.¹

CARRIERS—OF GOODS—WRONGFUL DELIVERY—BILL OF LADING—LIABILITY OF CARRIER. An interstate carrier is liable for consigned goods delivered to the consignee and lost to the consignor, where, before delivery, the consignor notified the carrier of the consignee's refusal to accept the goods, surrendered the bill of lading to the carrier, and directed a return of the goods, both at common law, and under 34 Stat. at L. p. 595, providing that, in receiving property for interstate transportation, carriers shall issue a bill of lading and shall be liable to the lawful holder thereof for any loss, damage, or injury to the property caused by it or by connecting carriers over whose lines the property passes.

SAME—WRONGFUL DELIVERY—ACT OF CONNECTING CARRIER—LIABILITY. In such a case, the initial carrier's duty does not end by merely carrying the goods to their destination safely, but it must make delivery to the persons entitled to receive them or store them subject to the consignor's orders; hence it cannot avoid liability under the above Federal act by the fact that a connecting carrier made the delivery.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered August 14, 1913, upon findings in favor of the plaintiffs, in an action for conversion, tried to the court. Affirmed.

Carey & Kerr and *Charles A. Hart*, for appellant.

Connor & Akins, for respondents.

FULLERTON, J.—On March 10, 1910, the respondents delivered to the appellant, at Vancouver, in this state, three boxes of goods for shipment to the Mutual Manufacturing Company, at Canton, in the state of Ohio. At the time of receiving the goods, the appellant issued to the respondents a through bill of lading, on its regular form, reciting therein that the goods were received for transportation to Canton, Ohio, and naming therein the Mutual Manufacturing Com-

¹Reported in 141 Pac. 324.

pany as consignee thereof. The appellant's lines do not extend through Canton, Ohio, and in transporting the goods, it delivered them to the Pennsylvania Railroad Company, a connecting carrier, at some point on that company's line.

On receiving the bill of lading, the respondents sent it by mail to the consignee of the goods, with a letter in which they announced the shipment. Some ten days later, the consignee returned the bill of lading by mail to the respondents, stating in a letter enclosed therewith that it would not receive the goods. The respondents thereupon notified the appellant of the attitude of the consignee, and gave directions to have the goods returned to them at Vancouver, at the same time surrendering to the appellant the bill of lading and guaranteeing the charges on the return shipment. The agent of the appellant at Vancouver, on April 16, 1910, addressed a letter to the agent of the Pennsylvania Railroad Company, at Canton, Ohio, advising that company of the surrender of the bill of lading, and requesting it to return the goods to the respondents at Vancouver, over the same route on which they were shipped. The Pennsylvania Railroad Company did not follow the instructions given it, for what cause the record is silent, and on April 25, 1910, some nine days after the letter had been mailed it, delivered the goods to the consignee. The goods were lost to the respondents, and this action was instituted against the appellant to recover their value. Recovery was allowed in the court below, and this appeal is taken from the judgment entered.

The appellant makes two principal contentions for reversal; first, that the delivery was not wrongful; and, second, that it is not responsible, being the initial carrier, for the failure of the Pennsylvania Railroad Company, the connecting carrier, to observe the directions for the return of the goods. In support of the first contention, it is argued that, since the goods were consigned to a named consignee without restriction or reservation of any sort in the bill of lading, the goods were presumptively the property of the consignee, and

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that it fulfilled its contract of carriage when it safely carried the goods to their destination and then delivered them in good order to the named consignee; that the consignor's sole remedy for the recovery of goods so consigned is the right of stoppage *in transitu*, and since the consignors in this case did not avail themselves of this right, it was the carrier's contract duty to deliver the goods to the consignee, and any deviation from that duty would have been at its peril.

But the rule, we think, was never as broad as this argument implies. The cases determined prior to the passage of the Carmack amendment of act to regulate commerce (34 Stat. at Large, 584), are, seemingly, inharmonious on the question whether a carrier can, with impunity, deliver a consignment of goods to the consignee named in the bill of lading without production of the bill of lading, even in instances where it has no knowledge that the consignee is not in the possession of the bill of lading, or it is without knowledge that the right to receive the goods is claimed by some person other than the consignee. See *Nebraska Meal Mills v. St. Louis Southwestern R. Co.* (Ark.), 38 L. R. A. 358, and cases collected in note. But we think the cases were practically uniform to the effect that a carrier delivered consigned goods to the consignee without the production of the bill of lading at its peril when it had knowledge, or reasonable cause to believe, that the consignee did not have the full beneficial interest in the goods. Our own case of *First Nat. Bank of Pullman v. Northern Pac. R. Co.*, 28 Wash. 439, 68 Pac. 965, is to this effect. There the consignor shipped two car loads of wheat by the railway company consigned to a flouring mill company. On receipt of the bills of lading, the consignor endorsed them to the plaintiff bank, receiving from the bank in cash the purchase price of the wheat. The railway company carried the wheat to its destination and delivered it to the consignee without requiring the production of the bill of lading. In an action by the

bank against the railway company for the amount advanced on the bills of lading, it was held that the railway company had notice of the custom of the dealer to pledge the bills of lading for advances on shipments, and that it was bound to notice this custom and was responsible to the bank for the money advanced. This was, however, an intrastate shipment and the decision was rested in part on the local statutes. The rule, however, as shown in the note to the case from the Lawyers Reports Annotated before cited, applies to interstate shipments.

We think, moreover, this question is concluded by the Federal statute. The amendment of the act to regulate commerce above cited, provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; . . ." (34 Stat. at Large, p. 595.)

This provision of the statute, it will be observed, makes it the duty of a common carrier receiving property for interstate transportation to issue a receipt or bill of lading to the consignor of such property, and makes it liable to any lawful holder of such receipt or bill of lading for any loss, damage, or injury to such property caused by it, or by any common carrier to which the property may be delivered or over whose lines such property may pass. Clearly, the statute recognizes the lawful holder of the bill of lading as the person entitled to receive the shipment, regardless of whom may be named as consignee, and this being true, the carrier delivers the goods transported at its peril, when it delivers

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without the production of the bill of lading. It cannot, we think, be questioned in this instance that the consignors of the goods were the lawful holders of the bill of lading at the time of the delivery of the goods to the consignee. The consignee had theretofore returned the bill of lading to the consignors with notice that it would not receive the goods; the consignors had notified the railway company of this refusal, had surrendered to it the bill of lading, and had directed a return of the goods. A delivery to the consignee under these circumstances was a conversion of the goods rendering the company liable for their value to the consignors.

The contention of the appellant that it is not liable as an initial carrier for the loss of this particular shipment, is based on the claim that it performed its contract of carriage; since it carried the goods safely from the point of shipment to the point of destination, and the wrong committed, if any, was committed by the connecting carrier. But the duty of an initial carrier with reference to goods transported does not end by merely carrying the goods to their destination safely. Delivery to the person entitled to receive the same, or, if delivery cannot be made, then safe storage subject to the orders of the consignors, is a part of the contract of carriage. The appellant performed neither of those obligations. It neither delivered the goods to the person entitled to receive them, nor did it store them subject to the order of the consignor. It is, therefore, liable for the loss, as the initial carrier, under the Federal statute above cited. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155; *Nashville, C. & St. L. R. Co. v. Dreyfuss-Weil Co.*, 150 Ky. 333, 150 S. W. 321; *Central Georgia R. Co. v. Sims*, 169 Ala. 295, 53 South. 826.

The judgment is affirmed.

CROW, C. J., MOUNT, MORRIS, and PARKER, JJ., concur.

[No. 11732. Department Two. June 20, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v. JOE H. DEER
*et al., Respondents.*¹

CRIMINAL LAW—MISDEMEANOR—PUNISHMENT—GAME—OFFENSES—UNLAWFUL HUNTING. Under 3 Rem. & Bal. Code, § 5395-23, of the game code, making it a gross misdemeanor to hunt deer with dogs, and providing that any person convicted thereof shall be punished "as hereinafter provided," without, however, making any provision in the game code for such punishment, the words "as hereinafter provided" may be treated as surplusage, and resort should be had to the general statute, 1 Rem. & Bal. Code, § 2267, providing that every person convicted of a gross misdemeanor for which no punishment is prescribed at the time of the conviction shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than \$1,000, or by both.

Appeal from a judgment of the superior court for Mason county, Claypool, J., entered November 7, 1913, dismissing a prosecution for hunting deer with dogs, upon sustaining a demurrer to the information. Reversed.

R. A. Lathrop, for appellant.

T. P. Fisk, for respondents.

MOUNT, J.—On October 21, 1913, the defendants in this case were convicted upon a trial in the justice court of the crime of hunting deer with dogs in Mason county. They were each fined \$25 and costs. They appealed from that judgment to the superior court for Mason county, where the trial court sustained a demurrer to the information and dismissed the action. The state has appealed from the judgment of dismissal.

The charging part of the complaint is as follows:

"Ed. J. Hanson, being first duly sworn, deposes and on oath says: that on to wit, the 19th day of October, 1913, in Mason county, state of Washington, the defendants, Joe H. Deer, Earl Tanning, Harold Munson, Lyn Lumdsen,

¹Reported in 141 Pac. 321.

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and Jacob Weinert did then and there wilfully and unlawfully, by means of a dog used therefor, hunt, pursue, take, kill, injure and possess one deer. Against the peace and dignity of the state of Washington and the statute in such case made and provided."

The statute, at 3 Rem. & Bal. Code, § 5395-23, provides:

"Any person who shall at any time shoot or kill in any manner a deer when such deer is in any river or lake, or body of salt water, or shall hunt or chase deer with dogs, shall be deemed guilty of a gross misdemeanor and upon conviction thereof shall be punished as hereinafter provided."

This section is § 23 of the game code, passed by the legislature in 1913. Laws of 1913, p. 366. There are fifty-three sections in this act. A violation of the sections of the act according to the terms thereof, for the most part, is made a misdemeanor without stating the punishment. Several sections, however, provide that a violation by any person shall constitute a gross misdemeanor, also without stating the punishment. Section 23 provides that any person who shall hunt deer with dogs "shall be deemed guilty of a gross misdemeanor and upon conviction thereof shall be punished as hereinafter provided." The act makes no provision for the punishment of a gross misdemeanor. Section 52 provides:

"Any attempt to violate any of the provisions of any section of this chapter shall be deemed a violation of such provision and any person attempting to violate any of the provisions of this chapter shall be guilty of a misdemeanor, unless otherwise designated as a gross misdemeanor." 3 Rem. & Bal. Code, § 5395-52.

But there is no provision in the act anywhere defining the punishment for a misdemeanor or a gross misdemeanor. It was held by the lower court that because of the words "and upon conviction thereof shall be punished as hereinafter provided," and because there was no punishment provided by the act itself, that therefore there was no punishment for the crime, and for that reason the demurrer was sustained

and the action dismissed. The last words of the section, namely, "and upon conviction thereof shall be punished as hereinafter provided," indicates that the legislature intended to make a provision for the punishment of a gross misdemeanor in the act itself. But this was not done. The general statute provides, at Rem. & Bal. Code, § 2267:

"Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both."

This statute was in force at the time the act of 1913 was passed. While it may have been the intention of the legislature when the game code was passed to state in the act the punishment for a gross misdemeanor, the fact that this was neglected did not, we think, render § 23 of the game code of no effect; for it is apparent that the legislature must have concluded that no specific punishment of a gross misdemeanor other than that already in force was necessary, and for that reason they either intentionally or unintentionally omitted to make provision in the act for such punishment. It is no doubt true that criminal statutes must be strictly construed in favor of one accused of crime. But it does not necessarily follow that, because the legislature used the words "and upon conviction thereof shall be punished as hereinafter provided," and thereafter made no provision, there is no punishment for the crime therein defined, especially where there was already a statute defining the punishment for the crime of gross misdemeanor. It is plain, we think, that the words, "and upon conviction thereof shall be punished as hereinafter provided," are a mere nullity and do not render the section ineffective. We are satisfied that the general statute relating to the punishment of gross misdemeanors is applicable to § 23 above quoted.

In the case of *State v. Ames*, 47 Wash. 328, 92 Pac. 137,

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where the pilotage act was attacked because the title of the act did not provide for a penal clause, we said:

"But if it be true that the title is not broad enough to include the provisions relating to the penalty, the result contended for would not follow. The penal clause only would be void, and the act would stand in the same category as other statutes prohibiting the doing of particular acts, but providing no penalty for their violation; the doing of such acts being prohibited by the general statutes as misdemeanors, punishable by imprisonment in the county jail for not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

What was said there, we think is applicable to this case. Where a statute makes its violation a gross misdemeanor without making provision for the punishment of a gross misdemeanor, the court is authorized to resort to the general statutes defining the punishment in such cases. We are of the opinion, therefore, that § 23 is effective, and that the trial court erroneously sustained the demurrer.

The judgment is therefore reversed.

CROW, C. J., FULLERTON, PARKER, and MORRIS, JJ., concur.

[No. 11776. Department Two. June 20, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. T. F. PRATT,
Appellant.¹

PHYSICIANS AND SURGEONS—PRACTICING MEDICINE—REGULATION—STATUTES—VALIDITY—EQUAL PROTECTION OF THE LAWS. Rem. & Bal. Code, § 8400, requiring a state license for the practice of medicine and surgery, osteopathy, "or any other system or mode of treating the sick," includes, and warrants a conviction for, the treatment of the sick by the laying on of hands, with suggestions from the mind of the operator to the mind of the patient; hence does not deny the equal protection of the laws in failing to specifically mention such system, along with "medicine," "surgery," and "osteopathy."

SAME—PRACTICING MEDICINE—REGULATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8405, providing that nothing in the chapter relating to licenses for practicing medicine and other modes of treating the sick shall apply to or regulate any kind of treatment by prayer, does not exclude from the operation of the chapter the practice of suggestive therapeutics, a system of treating the sick by the laying on of hands with suggestions from the mind of the operator to the mind of the patient; since the same is not any kind of treatment by prayer.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 4, 1913, upon a trial and conviction of practicing treatment of the sick without obtaining a certificate from the state medical board. Affirmed.

Longfellow & Fitzpatrick and *Harve H. Phipps*, for appellant.

John F. Murphy and *Louis T. Silvain*, for respondent.

MORRIS, J.—Appellant was convicted of practicing a mode of treating the sick known as suggestive therapeutics, without having a certificate from the state medical board. The appellant's brief is devoted to an argument seeking to establish the unconstitutionality of the law under which the complaint was made and conviction had, especially attacking

¹Reported in 141 Pac. 318.

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that provision of Rem. & Bal. Code, § 8400 (P. C. 333 § 27), included in the words, "or any other system or mode of treating the sick or afflicted." The whole section, so far as pertinent, is as follows:

"Any person who shall practice or attempt to practice, or hold himself out as practicing medicine and surgery, osteopathy, or any other system or mode of treating the sick or afflicted in this state, without having, at the time of so doing, a valid, unrevoked certificate as provided in this chapter, shall be guilty of a misdemeanor, . . ."

The argument is that such provision denies to those persons engaged in the practice of any system or mode of treatment not embraced within the terms "medicine," "surgery," and "osteopathy," as mentioned in this section, the equal protection of the law, in establishing an arbitrary classification and denying to those within such classification the right to engage in a lawful occupation. Counsel's argument in support of his contention is interesting, and we have read it with much care. It is the same argument made by the defendant in *State v. Greiner*, 63 Wash. 46, 114 Pac. 897, in contending that one who followed the method of treatment of the sick known as chiropractic, was not within the prohibition of the law, and the method itself not subject to legislative control. We there said none of the objections then raised were well founded. Upon the same reasoning, we express the same opinion as to the objections now raised by appellant, and content ourselves with citing the *Greiner* case.

Counsel for appellant seems to find some distinction between this case and that one, in his contention that the law does not include suggestive therapeutics. One of the objections in the *Greiner* case was that the chiropractic treatment of the sick was not embraced within the act and that, under the rule of *ejusdem generis*, chiropractic treatment was not prohibited, nor was it within the power of the legislature to regulate such practice. So that we find nothing

new and no reason for extending our discussion beyond what is said in the *Greiner* case.

The sufficiency of the evidence is also challenged. It would be of no value to quote it. No doubt suggests itself to our mind but that the facts are sufficient to sustain the conviction.

It is also suggested that § 8400 must be construed with § 8405, reading in part:

“Nor shall this chapter be construed to discriminate against any particular school of medicine or surgery or osteopathy or any system or mode of treating the sick or afflicted, or to interfere in any way with the practice of religion: Provided, That nothing herein shall be held to apply to or to regulate any kind of treatment by prayer.”

Suggestive therapeutics, as shown by the record before us, is not the practice of any religious belief, nor it is “any kind of treatment by prayer.” As practiced by the appellant, it consists of a laying on of hands upon that part of the body where the trouble is and, quoting from appellant’s testimony, “upon certain parts of the spine that controls this—these nerves, or the nerves that control the organ; and I give certain suggestions which goes from my mind to the mind of the patient, and the mind of the patient controls his own body. That is the way the cure is performed.” The claim is also made that, by this laying on of hands, certain “vibrations” are sent through the body, that are instrumental in effecting the cure. That the mind exercises a powerful and oftentimes controlling influence upon the body cannot be denied, and we are offering no criticism upon appellant’s methods. We are only concerned with the fact that it is a mode of treating the sick, and as such can be practiced only after obtaining the proper certificate from the state medical board.

The judgment is affirmed.

Crow, C. J., MOUNT, and FULLERTON, JJ., concur.

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Opinion Per MORRIS, J.

[No. 11813. Department Two. June 20, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. JESS PEASLEY,
Appellant.¹

CRIMINAL LAW—PRINCIPALS—AIDING AND ABETTING—WHAT CONSTITUTES—"ASSENT"—INSTRUCTIONS. It is error to instruct that one jointly informed against for grand larceny may be convicted if the property was taken by his codefendants with his aid "or assent"; in view of Rem. & Bal. Code, § 2260, which predicates the aiding and abetting of the commission of an offense upon the overt acts of aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring the commission thereof; since mere assent to an act is a mental attitude and does not imply contribution or expressed concurrence.

CRIMINAL LAW—TRIAL—INSTRUCTIONS. An erroneous instruction authorizing a conviction of grand larceny if the defendant "assented" to the commission of the act, is not cured by a subsequent correct instruction which also authorizes his conviction if he actively participated or contributed to the crime by his own act in aiding his confederate.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 20, 1913, upon a trial and conviction of grand larceny. Reversed.

William R. Bell (John F. Dore, of counsel), for appellant.

John F. Murphy, Crawford E. White, and Reah M. Whitehead, for respondent.

MORRIS, J.—Appellant was joined with two others in an information charging grand larceny. He was tried separately and, having been convicted, appeals.

The only error we are disposed to notice is an exception to an instruction given to the jury, and since this raises a question of law only, no attention will be given to the facts. The instruction complained of is this:

"To convict the defendant it is not necessary that you should find that he personally stole the money of Soter, if the same was stolen, but if it was taken by either of his

¹Reported in 141 Pac. 316.

co-defendants with his aid *or assent*, with intent to deprive said Soter thereof, then he would be just as guilty as though he himself had taken it."

We cannot sustain this instruction. Our statute on aiding and abetting, Rem. & Bal. Code, § 2260 (P. C. 135 § 15), reads as follows:

"Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him."

Each of the words used in this statute upon which a criminal charge can be predicated signifies some form of overt act; the doing or saying of something that either directly or indirectly contributes to the criminal act; some form of demonstration that expresses affirmative action, and not mere approval or acquiescence, which is all that is implied in assent. To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act. *State v. Douglass*, 44 Kan. 618, 26 Pac. 476; *White v. People*, 81 Ill. 333; *Plummer v. Commonwealth*, 1 Bush (Ky.) 76; *State v. Cox*, 65 Mo. 29; *True v. Commonwealth*, 90 Ky. 651, 14 S. W. 684; *Clem v. State*, 33 Ind. 418.

The state contends that, in giving a subsequent instruction, the defect in this instruction was cured, under the rule that the instructions are to be read as a whole in deter-

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mining whether or not prejudicial error has been committed. This second instruction is as follows:

"If Soter left the money which he claims he left in a box in charge or custody or control of this defendant, and if the defendant with intent to deprive or defraud Soter thereof took it himself or aided either of his co-defendants to take it, then you will find the defendant guilty of grand larceny. But if he gave it back to Soter or disposed of it according to Soter's orders and directions, then he is not guilty."

This instruction is correct, but it does not cure the error in its predecessor, for here the court limits the appellant's contribution to the crime to either his own act or aiding his confederate; while in the former he includes both these acts, which include active participation in the crime charged and also the assent of the appellant as sufficient to include guilt. So that, when read together, the jury are told it is sufficient to find that appellant personally took the money, or aided his codefendants in taking it, or assented to his codefendants taking it.

There is no rule under which this error can be overlooked, and the judgment is reversed and the cause remanded for a new trial.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11884. Department Two. June 20, 1914.]

*In re J. E. FERGUSON.*¹

SUNDAY—REGULATION OF THEATERS—STATUTES—AUTHORITY OF CITY. An ordinance of a city of the third class prohibiting the keeping open of theaters on Sunday is not inconsistent or in conflict with Rem. & Bal. Code, § 2494, making it unlawful to disturb the peace of Sunday by noisy sports or unnecessary labor, or Id., § 2499, prohibiting shows, plays and boisterous amusements that wilfully disturb religious assemblages; since nothing in those, or any other acts, expressly permit playhouses to keep open on Sunday.

SUNDAY—REGULATION OF THEATERS—POLICE POWER OF CITY. Under Const., art. 11, § 11, vesting in cities the power to make reasonable police regulations within their limits, and Rem. & Bal. Code, § 7685, subd. 21, authorizing cities of the third class to enforce within their limits, police regulations not in conflict with general laws, such a city has authority under its police power to prohibit the opening of theaters on Sunday, in the absence of any general law expressly permitting them to be opened.

SAME. The prohibition of opening theaters on Sunday is a regulation, and not a prohibition, of theaters, and hence is a valid exercise of the police power, even if the city is merely authorized to license theaters for the purpose of regulation and revenue.

SUNDAY—REGULATION OF THEATERS—PUBLIC POLICY—STATUTES—CONSTRUCTION. The repeal of a statute prohibiting the opening of theaters on Sunday, and the enactment of statutes prohibiting noisy amusement and disturbances of religious assemblages, impliedly permitted the opening of theaters on Sunday; but was not a declaration of the policy of the state against the closing of theaters on Sunday; hence an ordinance closing them, under the police power of a city, is not void, as against the policy of the state.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF BUSINESS. An ordinance prohibiting the opening of theaters on Sunday is not an unreasonable exercise of the police power.

MUNICIPAL CORPORATIONS—ORDINANCES—GOOD FAITH. The courts cannot inquire into the motives impelling the passage of an ordinance, reasonable on its face, or question its reasonableness from the fact that it was passed by a majority of the council over the mayor's veto.

¹Reported in 141 Pac. 322.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered March 6, 1914, denying an application for a writ of habeas corpus, after a hearing before the court. Affirmed.

Whitney & Hughes and Sam R. Sumner, for appellant.

Fred Kemp and E. L. Baker, for respondent.

MOUNT, J.—The city of Wenatchee, a city of the third class, passed an ordinance, the first section of which reads as follows:

"It shall be unlawful for any person, firm, association or corporation, whether as owner, proprietor, keeper, or agent to keep open, run, manage, or conduct any play house, theater, opera house, moving picture show, or museum, or to keep open, run, manage or conduct any roller skating rink, bowling alley, dance hall or dance pavilion, billiard hall, pool room or shooting gallery or to engage in any of the said business or amusements or to engage in any noisy amusements on the first day of the week commonly called Sunday: . . ." Ordinance No. 440.

Section 8 of the ordinance provides that any person violating any of the provisions of the ordinance shall be guilty of a misdemeanor.

A complaint was filed in the police court of the city of Wenatchee, charging that the appellant, in violation of the ordinance, did, on a certain Sunday, "wilfully and unlawfully keep open, and run the Wenatchee Theater, the same being then and there a playhouse and wherein the said defendant did then and there manage and run a moving picture show for profit, and the said defendant being then and there proprietor and owner of the said theater and playhouse, contrary to Ordinance No. 440 of the said city of Wenatchee."

On the filing of this complaint, a warrant of arrest was issued and placed in the hands of the chief of police of the city. The appellant was taken into custody. When arrested, the appellant petitioned the superior court of Chelan

county for a writ of habeas corpus. The writ was issued and a hearing had thereon before the superior court, where the writ was denied and the appellant remanded into custody for trial. This appeal is prosecuted from that order.

The only question presented upon this appeal is the validity of the ordinance. It is argued by the appellant that the ordinance is void, first, because it is in conflict and inconsistent with the statutes of the state; second, because it was not enacted under any express or implied power vested in the city; third, because it is against public policy of the state; and fourth, because the ordinance is unreasonable and not enacted in good faith. We shall notice these contentions in their order.

The statutes of the state provide at Rem. & Bal. Code, § 2494 (P. C. 185 § 483):

“Every person who, on the first day of the week, shall promote any noisy or boisterous sport or amusement, disturbing the peace of the day; or who shall conduct or carry on, or perform or employ any labor about any trade or manufacture, except livery-stables, garages and works of necessity or charity conducted in an orderly manner so as not to interfere with the repose and religious liberty of the community; or who shall open any drinking saloon, or sell, offer or expose for sale any personal property, shall be guilty of a misdemeanor. . . .”

Rem. & Bal. Code, § 2499 (P. C. 185 § 493), provides:

“Every person who shall wilfully disturb, interrupt, or disquiet any assemblage of people met for religious worship—

“(1) By noisy, rude or indecent behavior, profane discourse, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting; or,

“(2) By exhibiting shows or plays, or promoting any racing of animals or gaming of any description, or engaging in any boisterous or noisy amusement; or

“(3) By disturbing in any manner, without authority of law within one mile thereof, free passage along a highway

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to the place of such meeting, or by maliciously cutting or otherwise injuring or disturbing a harness, conveyance, tent or other property belonging to any person in attendance upon such meeting;

"Shall be guilty of a misdemeanor."

It will be noticed that § 2494 above quoted makes the matters therein described unlawful when they disturb the peace of the day; and that § 2499 prohibits shows, plays, and boisterous amusements when the same wilfully disturbs, interrupts or disquiets an assemblage of persons for religious worship. But there is nothing in these sections, or any other section which is called to our attention, which expressly permits playhouses, theaters, opera houses, moving picture shows or amusements to keep open upon Sunday. The statutes of the state above quoted are the only statutes upon the subject which are called to our attention. It is true that playhouses, theaters, opera houses, and moving picture shows are not prohibited by those sections. They are impliedly permitted to keep open and to run upon any day, unless they disturb the peace or quiet of the day. We think it is clear, therefore, that the ordinance which prohibits the management and conduct of these houses upon Sunday is not in conflict with the state statutes upon the subject. In *Bellingham v. Cissna*, 44 Wash. 397, 87 Pac. 481, where the statute of the state prohibited the speed of automobiles in excess of twelve miles per hour, we held that cities might fix the speed therein at less than twelve miles per hour and that such ordinance would not be in conflict with the state statutes. If the state by statute had expressly permitted theaters, opera houses, and moving picture shows upon Sunday, then it would be clear that the city could not pass an ordinance which would prohibit such shows upon Sunday. But where a statute only impliedly permits such shows upon Sunday and does not expressly permit them, it is within the power of cities to pass ordinances prohibiting such shows, and such

ordinances clearly would not be in conflict with the state statutes.

It is next argued that the ordinance is void because it was not enacted under any express or implied power vested in the city. Section 11 of article 11, of the constitution of the state, confers the police power upon cities as follows:

“Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.”

Subdivision 21 of the statutory charters for cities of the third class confers the following power:

“To make all such ordinances, by-laws, rules, regulations and resolutions, not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the corporation and its trade, commerce and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter, and to exact and enforce within the limits of such city all other local, police, sanitary and other regulations as do not conflict with general laws.” Rem. & Bal. Code, § 7685 (P. C. 77 § 323).

In *In re Donnellan*, 49 Wash. 460, 95 Pac. 1085, we held that a statute prohibiting the keeping open of any theater on Sunday was a valid and appropriate exercise of the police power. If such a statute was a valid exercise of the police power on the part of the state, the enactment of such an ordinance would, for the same reason, be a valid exercise of the police power on the part of a city. We are satisfied, therefore, that where the state has not expressly permitted theaters and shows to be opened and conducted on Sunday, the city, under its police power, has the right to regulate such shows.

The appellant argues that, because the statute provides, at § 7685, subd. 10 (P. C. 77 § 323), for an express grant of power to cities in relation to theaters as follows:

“To license, for purposes (of) regulation and revenue, all and every kind of business, including the sale of intoxicating

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liquors, authorized by law, and transacted and carried on in such city, and all shows, exhibitions and lawful games carried on therein and within one mile of the corporate limits thereof, to fix the rate of license tax upon the same, and to provide for the collection of the same by suit or otherwise;" therefore cities have the power to license for purposes of regulation and revenue these theaters and shows, and that the power to license for purposes of regulation does not include the power to prohibit. It may be conceded, for the purposes of this case, that the power to license for purposes of regulation and revenue does not carry with it the power to prohibit. But the prohibition of a show on Sunday is not a total prohibition. It is only a regulation of a show.

"While the power to 'regulate' does not necessarily imply power to 'prohibit' or 'suppress,' it confers authority to confine the business referred to to certain hours of the day, to certain localities or buildings in the city, and to prescribe rules for its prosecution within those hours, localities, and buildings." See 28 Cyc. 751, note 68.

The prohibition of theaters on Sunday is a regulation merely and not a prohibition, and was, therefore, a valid exercise of the power of the city.

It is next argued that the ordinance is against the public policy of the state, and is therefore void. It appears that, prior to the year 1909, the statutes of the state prohibited theaters upon Sunday. This statute was attacked in *In re Donnellan, supra*, in the year 1908, upon several grounds; and we held the statute was a valid exercise of police power on the part of the state. Thereafter, in the year 1909, the legislature repealed this provision of the statute, and enacted §§ 2494 and 2499 hereinabove quoted. It is argued by the appellant that the repeal of this statute and the enactment of the later statute declared the policy of the state as permitting theaters and shows to be open and conducted upon Sunday; and it is no doubt true, as we have said above, that the repeal of this statute prohibiting theaters on Sun-

day was an implied permission of such theaters. But, as we have heretofore said, an implied permission does not create the policy of the state. The policy of the state is declared by express statutes and not by implication. If the state had expressly by statute authorized theaters and shows to be conducted upon Sunday, that would no doubt be a declaration of a policy. But where it makes no declaration upon the subject, no policy is declared. The ordinance, therefore, is not against the policy of the state. The policy of the state no doubt was to permit theaters to be carried on upon Sunday except in cities acting under the police power which might restrain such theaters and declare a policy within such cities. We think the ordinance is not against the policy of the state.

It is next argued that the ordinance is void because it is unreasonable and was not enacted in good faith. There is no merit in this contention, because the state, and cities within the state, have the right to pass statutes and ordinances prohibiting any sort of public exhibition or amusement on Sunday in order to preserve peace and order. *In re Donnellan, supra*. The ordinance in question in this case was passed by a majority of the council, over the mayor's veto. But that fact does not show that the ordinance is either unreasonable or was enacted in bad faith. If an ordinance is reasonable on its face and was regularly passed by the proper power, it is not for the courts to inquire into motives which have impelled the passage of such ordinance. Good faith in the passage of laws must be presumed by courts.

We find no merit in the appeal, and the judgment of the lower court must therefore be affirmed.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 12097. Department Two. June 20, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Charles
Merrill, Plaintiff*, v. THE SUPERIOR COURT FOR
KING COUNTY, *Respondent*.¹

APPEAL—JURISDICTION—RIGHT TO DETERMINE—PROHIBITION. Prohibition lies to prevent issuance of an execution upon a judgment pending appeal, about to be issued on the ground that notice of appeal was not given in time; since the supreme court alone has jurisdiction to determine the sufficiency of the appeal, under Rem. & Bal. Code, §§ 1731 and 1733, providing that, upon the taking of an appeal, the supreme court shall acquire jurisdiction for all necessary purposes and shall control the superior courts in all matters pertaining to the appeal, and may dismiss an appeal for want of jurisdiction or insufficiency of the notice or proceedings.

Application filed in the supreme court May 29, 1914, for a writ of prohibition to the superior court for King county, Frater, J., to prevent proceedings on execution, pending an appeal. Writ granted.

P. Tworoger and *Mark M. Litchman*, for plaintiff.

John F. Murphy and *H. B. Butler*, for respondent.

FULLERTON, J.—This is an original application for a writ of prohibition. The application is based on the following facts: On October 14, 1913, an information was filed in the superior court of King county, charging the petitioner, Charles Merrill, with the offense of unlawfully conducting a building and loan association. On January 20, 1914, the petitioner was put upon trial for the alleged offense before one of the judges of the superior court named, sitting without a jury. At the conclusion of the trial, the court found the petitioner guilty, and forthwith pronounced judgment upon him, sentencing him to pay a fine of two hundred dollars. Two days thereafter, namely, on January 22, 1914, the petitioner moved for a new trial and in arrest of judgment,

¹Reported in 141 Pac. 317.

which motions were overruled by the court on February 17, 1914. On March 17, 1914, the petitioner filed a bond on appeal in the sum of \$1,000, and on April 21, 1914, served and filed a notice of appeal from the judgment and from the orders denying his motions for a new trial and in arrest of judgment. Thereafter, and on May 13, 1914, the prosecuting attorney of King county, acting on behalf of the state, moved in the superior court for an execution against the petitioner, based on the ground that the attempted appeal was ineffectual because notice thereof was not given and served within the time limited by the statute. The court granted the motion, and this writ is sought to prohibit the court from carrying the order into effect.

We think the writ should issue. This court, alone, has power to determine the regularity and sufficiency of an appeal in any given case. Whether or not the appeal is properly taken, being a question of jurisdiction, the court could not recognize the power of another tribunal to determine it, without surrendering its authority as a court of final resort. *Lester v. Howard*, 24 Md. 233; *Moore v. Randolph*, 52 Ala. 530; *Missouri K. & T. R. Co. v. Smith*, 154 Mo. 300, 55 S. W. 470; *State v. Dinmisse*, 41 Mo. App. 22; *Younger v. Pagles*, 60 Cal. 517.

Such, also, is the rule of the statute. By § 1731 of Rem. & Bal. Code (P. C. 81 § 1215), it is provided that, upon the taking of an appeal by notice and the filing of a bond to render the appeal effectual, the supreme court shall acquire jurisdiction of the appeal for all necessary purposes, and shall have control of the superior courts and all inferior officers in all matters pertaining to the appeal, and may enforce such control by mandate or otherwise. By § 1733 (P. C. 81 § 1219), it is provided that a respondent may move in this court to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal is taken, or that the notice of appeal from the judgment or order was not

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Syllabus.

served or filed within the time limited by law or is insufficient in substance or form, or that the appeal bond was not filed within the time limited by law, or that the appeal is irregular or insufficient in other respects. Plainly these provisions of the statute vest in this court jurisdiction to determine all questions concerning the regularity of the appeal after notice given and bond filed, and relegates the respondent to this court for the purpose of raising such questions.

Let the writ issue.

Crow, C. J., MORRIS, and MOUNT, JJ., concur.

[No. 11392. Department Two. June 23, 1914.]

CLARA WENDT, *Respondent*, v. INDUSTRIAL INSURANCE
COMMISSION OF WASHINGTON, *Appellant*.¹

MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—STATUTES—CONSTRUCTION. A corporation is engaged in an extra hazardous employment, within the purview of the industrial insurance act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, where, in connection with its main business of conducting a large department store, it maintains a work shop for repairs where power-driven machinery is employed and manual labor exercised, over which place it has control, in view of *Id.*, § 6604-2, enumerating, among the hazards embraced, workshops where machinery is used, and § 6604-3, defining workshops as rooms or places wherein power-driven machinery is employed and manual labor exercised . . . in or incidental to making, repairing, or adapting any article, over which place the employer has the right of access or control.

SAME—EXTRA HAZARDOUS EMPLOYMENTS—CARPENTERS—STATUTES—CONSTRUCTION. A carpenter employed by a large department store in making repairs, alterations and fittings and doing carpenter work about the store, who was killed while attempting to turn on the electric power in the workshop where power-driven machinery was employed, is a "workman" within the protection of the industrial insurance act, where his employer was, in one of its departments, through the operation and control of a workshop employing power-driven machinery, engaged in an extra hazardous employment within the definition of 3 Rem. & Bal. Code, §§ 6604-2 and

¹Reported in 141 Pac. 311.

6604-3; in view of Id., § 6604-4, including in the particular classes of industry covered by the act, class 5, under construction work, "carpenter work not otherwise specified," and class 29, under factories using power-driven machinery "working in wood not otherwise specified;" and in view of the further provision that, if an employer, besides employing workmen in extra hazardous employments, shall also employ workmen in other employments, the act shall apply only to the extra hazardous departments and employments of workmen employed therein.

SAME—WORKMEN'S COMPENSATION—PERSONS PROTECTED—SCOPE OF EMPLOYMENT. A carpenter employed in a department store having a repair shop where power-driven machinery is employed, is acting within the scope of his employment, and so is within the purview of the industrial insurance law, where he was killed while turning on the electric switch to start a grindstone for the purpose of sharpening a chisel for use in his work.

STATUTES—CONSTRUCTION—DEPARTMENTAL CONSTRUCTION. The departmental interpretation of the industrial insurance commission law, under advice of the attorney general, while entitled to weight, is not binding on the courts where the law was not uncertain or obscure.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered May 9, 1913, upon findings in favor of the plaintiff, overruling the industrial insurance commission in denying compensation to a widow, upon an agreed statement of facts. Affirmed.

The Attorney General and *S. H. Kellern*, Assistant, for appellant.

J. W. Quick and *Norwood W. Brockett*, for respondent.

MORRIS, J.—Respondent appealed to the lower court from a decision of the industrial insurance commission that she was not entitled to compensation upon the accidental death of her husband, the decision being based upon the ground that the deceased was not engaged in hazardous employment, within the meaning of the law, at the time of receiving the injury causing his death. The lower court overruled the finding of the commission, and directed that the claim be allowed, from which decree the commission has appealed.

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Opinion Per MORRIS, J.

The case was submitted below and here on an agreed statement of facts, from which it appears that, at the time of his death, George Wendt was a carpenter, employed by the Stone-Fisher Company, of Tacoma; that the Stone-Fisher Company is a corporation owning and operating a large department store, engaged in the general buying and selling of merchandise of various kinds, occupying nine floors, employing one hundred and seventy persons, and having three delivery wagons and three delivery automobiles; that, diagonally across the alley from the store, the company maintains a repair shop, operated primarily for the repair of its delivery wagons and automobiles; that, in this repair shop, is a carpenter's bench, carpenter's tools, and a power lathe, emery wheel, grindstone, drills, etc., which are operated by electric current by a two-horse power electric motor, the current being furnished by the city of Tacoma over a low tension wire carrying 220 volts. This current is turned on and off by an ordinary strap switch with copper contacts and rubber handles, the switch being placed upon the wall from five to six feet above the floor. Attached to the rubber handles is also a string, which may be taken hold of and used for the purpose of pulling the handle down for the purpose of turning on the current. Employed in this machine shop, is a machinist electrician, who repairs the delivery automobiles used in connection with the store and has charge of operating the power-driven machinery in the shop.

The company employs ordinarily one, but sometimes two or three, carpenters for the purpose of making shelving, standards for display purposes, and necessary repairs, additions, and alterations in the fittings of the store, and the doing of odd carpenter jobs about the store. The deceased had been employed by the company as head carpenter prior to March 20, 1912, the day upon which he met his death, and in such employment had performed the ordinary carpentry work needed by the company in and about the store. On the day of the accident, Wendt attempted to turn on the electric

current by means of the switch, for the purpose of putting in motion a grindstone on which he was going to sharpen a chisel. In taking hold of the handle of the switch, his fingers came in contact with the copper fittings or contacts, and he was instantly killed by the electric current, caused by the secondary wire of the city of Tacoma, which carried the current into the repair shop, becoming crossed with a high tension wire of a power company, which carried a high voltage and which caused about 2,700 volts to pass through his body. Wendt had nothing to do with the maintenance or repair or operation of the electric or power machinery of the shop, or with the maintenance or the repair of the delivery wagons or automobiles. He left surviving him the plaintiff, his widow, who was residing with him at the time of his death, and who was dependent upon him for support. Upon the decease of George Wendt, his widow made her application to the industrial insurance commission, fully complying with all the requirements of the law relating to necessary proof, and her claim was rejected by the commission upon the grounds previously stated.

The act to be interpreted is chapter 74, Laws 1911, p. 345 (3 Rem. & Bal. Code, § 6604-1 *et seq.*). Section 1 of this act, in announcing the policy of the state in its treatment of working men injured in hazardous undertakings, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief is provided for workmen injured in extra hazardous work, and their families and dependents, regardless of questions of fault, and to the exclusion of every other remedy. Section 2 (*Id.*, § 6604-2) in enumerating the hazards intended to be embraced within the term "extra hazardous" as used in the act, names "factories, mills and workshops where machinery is used," and ends with this general description of included occupations: "If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act." Section 3 (*Id.*, § 6604-3) defines workshop as follows:

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"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control." In the same section, workman is defined as every person in this state who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled in the act. Section 4 (Id., § 6604-4) in referring to the particular classes of industry covered by the act, includes in class 5 of the construction work, "carpenter work not otherwise specified;" in class 29, under the heading "Factories (using power-driven machinery)" "working in wood not otherwise specified;" in class 34, under the same heading, "machine shops not otherwise specified." The same section provides that, if an employer besides employing workmen in extra hazardous employment shall also employ workmen in employments not extra hazardous, the provisions of the act shall apply only to the extra hazardous departments and employments and the workmen employed therein.

It being shown that the deceased, at the time of his injury, was employed in a "workshop where machinery is used;" that the workshop was a place "wherein power-driven machinery is employed and manual labor is exercised . . . over which place the employer of the person working therein has the right of access or control," and that he was injured "upon the premises," it seems to us there is no escape from the conclusion that his injury is within the purview of the act.

The commission makes, as its strongest contention, the claim that it is necessary to show that the employer was engaged in some extra hazardous work or employment within the meaning of the act, either in respect to his whole business or in some department thereof, in order that an injured em-

ployee shall become entitled to the protection of the act, and that it is not enough to show that the injured employee himself was engaged in some extra hazardous work without regard to the nature of the employer's business, assuming, for the purpose of this contention, that the Stone-Fisher Company was not engaged in an extra hazardous business. It may be admitted that, in its main business of conducting a large department store, the Stone-Fisher Company was not engaged in an extra hazardous industry, but, in connection with and as a part of this business, it maintains a workshop where machinery is used, power-driven machinery is employed, and manual labor is exercised, over which place it has the right of access or control, which place is expressly included within the enumeration of extra hazardous work in § 2 and within the definition of § 3. Not only, then, do we find an express inclusion of the place where the deceased was injured, but the further language of § 2, "if there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act," is an expression of the legislative intent to bring under the provisions of the act every character of work which from its nature should be found to be extra hazardous. In addition, the employment in which Wendt met his death would fall within the three classes quoted from § 4, "carpenter work not otherwise specified," "working in wood not otherwise specified," and "machine shops not otherwise specified." Again, the act recognizes in § 4 that the same employer may at the same time be engaged in employments both within and without the purview of the act, so far as the hazardous character of the employment is concerned; in which case the act shall apply only to the extra hazardous departments and to the workmen employed therein. So, however we answer the contention of the commission, whether it is necessary for the employer to engage in some extra hazardous work either in respect to his whole business or some department thereof, in order that an injured employee shall be entitled to protection,

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or whether it is only necessary to show that the injured employee himself was engaged in some extra hazardous work, the result upon the submitted facts must be the same. The business of the Stone-Fisher Company was, within the meaning of this act, extra hazardous in the maintenance of the workshop where power-driven machinery and men were employed, and the deceased himself was, at the time he met his death, engaged in an extra hazardous employment as defined by the act. If we could so construe the act that the extra hazardous character of the employer's business was to be determined by the business he was principally engaged in, we might accept the finding of the commission; but the act, as we have seen, recognizes the fact that the same employer may conduct different departments of business, some of which fall within the act, some of which do not. And in this connection it matters not which is the principal business and which is the incidental business. If the employer conducts any department of his business, whether large or small, as an extra hazardous business within the meaning and defined terms of this act, his workmen would come within the class designated by the act, and be entitled to the protection of the act. Such interpretation, we believe, falls within the letter as well as the spirit of an act that, because of its humaneness and declaration of a new public policy, should be interpreted liberally and broadly, in harmony with its purpose to protect injured workmen and their dependents independent of any question of fault.

The commission raises some question as to whether Wendt at the time of his injury was acting within the scope of his employment. We think that, in attempting to turn on the electric current for the purpose of putting in motion a grindstone on which he intended to sharpen his chisel, he was clearly acting within the scope of his employment as carpenter, irrespective of the stipulated fact that he had nothing to do with the maintenance or operation of the power-driven machinery in the shop. Giving full force to that stipulation,

we do not believe that it excludes, either in law or in fact, the act Wendt was engaged in when he received his injury. A carpenter is certainly acting within the scope of his employment when he is sharpening, or preparing to sharpen, his tools; and we may recognize the fact that a chisel is a common tool for a carpenter and requires frequent sharpening.

The last contention of the commission is that the interpretation of the act by the commission under advice from the attorney general ought to be given weight in the event that the act is of doubtful construction. It has long been the law that, where an act is uncertain or obscure, the interpretation of that governmental department having to do with its administration and enforcement is entitled to great weight. Giving full force to such a rule and recognizing it as we have in our previous decisions, it does not seem to us that, in answering the question submitted by this appeal, we find the act so uncertain or obscure as to make it proper or necessary to seek administrative interpretation in ascertaining its meaning.

The judgment of the lower court is affirmed.

CROW, C. J., PARKER, and FULLERTON, JJ., concur.

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Opinion Per PARKER, J.

[No. 11800. Department Two. June 23, 1914.]

W. C. METCALF, *Appellant*, v. J. O. STOREY, *Respondent*.¹

APPEAL—PRESERVATION OF GROUNDS—FINDINGS—EXCEPTIONS. In the absence of exceptions to the findings of fact, they are conclusive on appeal.

PLEADINGS—JUDGMENT ON PLEADINGS—ANSWER—SUFFICIENCY. In an action for a broker's commissions, judgment on the pleadings cannot be granted on the theory that affirmative defenses admitted the employment, where the defenses showed that the broker failed to perform his contract, and the answer denied that he rendered any services.

BROKERS—ACTIONS FOR COMMISSIONS—DEFENSES—FAILURE TO PERFORM. There is no liability for a broker's commissions, agreed to be paid upon the completion of a certain trade, where it was conclusively established that the trade was not completed.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered July 9, 1913, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Geo. B. Cole and John Wesley Dolby, for appellant.

Coiner & Dentler, for respondent.

PARKER, J.—The plaintiff seeks recovery of compensation which he claims from the defendant as commission for services rendered to the defendant in effecting an exchange of real property. A trial before the court without a jury resulted in findings and judgment in favor of the defendant, from which the plaintiff has appealed.

Appellant is a real estate broker. His claim of employment and compensation therefor rests upon a writing which, so far as we need here notice its terms, reads as follows:

"This agreement made and entered into this 21st day of October, 1912, between J. O. Storey of Tacoma, Wash.,

¹Reported in 141 Pac. 315.

party of the first part, and Peter Creso, of Tacoma, Wash., party of the second part;

"Witnesseth, That said first party is the owner of the following described property, to wit: [Here is a description of certain lands.]

"The said J. O. Storey agrees to sell and convey the said property by good and sufficient deed to the party of the second part. And accept in full payment therefor the following described property, to wit: The apartment known as The Creso, located in Tacoma, Washington, and located on Division and K streets, together with the appurtenances, hereditaments and furniture contained in said apartments belong to said premises. [Here follows specification of additional terms, including giving of mortgage for difference in value of the properties.] The above offer to be accepted or rejected within ten days from date hereof. . . .

"Upon the completion of said trade, I, the undersigned, agree to pay W. C. Metcalf a cash commission of one thousand dollars.
J. O. Storey."

This paper is signed only by Storey. The trial court found as a fact: "That the trade mentioned in said written instrument has not been completed." The record before us does not contain any exception to this finding, nor does counsel for appellant claim that its correctness was challenged in any manner in the trial court, nor did counsel for appellant request any additional or more specific finding touching the question of his rendering the services for which he claims compensation under this writing, though the correctness of this finding is challenged here.

Accepting as true this finding of the trial court, as we must, in the absence of exceptions thereto (*Washington Trust Co. v. Local & Long Distance Tel. Co.*, 78 Wash. 627, 132 Pac. 398), we are quite unable to discover any possible ground upon which appellant can recover.

There is presented in the briefs of counsel the question of appellant's right to judgment upon the pleadings, evidently upon the theory that the affirmative defenses set up by counsel for respondent show that the prospective trade, with some

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modifications as to terms, was eventually consummated between Storey and Creso some time after the expiration of the ten days named in the writing here relied upon by counsel for appellant. These affirmative defenses do show that there was some such an exchange of the properties some time after the expiration of the ten-day period named; but they also show that the final consummation of that exchange was upon terms very much more unfavorable to Storey than the original terms mentioned in the writing; that appellant had entirely abandoned his efforts to consummate any exchange of properties between Storey and Creso; and that the final exchange was brought about entirely without his efforts. Besides, respondent's answer contains a denial that appellant ever rendered any service in the bringing about of the exchange. It seems plain to us that the court did not err in denying appellant's motion for judgment upon the pleadings.

The question of the sufficiency of this writing as evidence of appellant's employment under Rem. & Bal. Code, § 5289 (P. C. 203 § 3), is presented in briefs of counsel, but whatever our view might be on this question, appellant could, in no event, recover, in view of the fact that the final consummation of the exchange was not the result of his efforts.

The judgment is affirmed.

Crow, C. J., Mount, Morris, and Fullerton, JJ., concur.

[No. 11926. Department Two. June 23, 1914.]

JACOB AMBAUM, *Appellant*, v. THE STATE OF WASHINGTON,
Respondent.¹

STATES—CONTRACT—HIGHWAY CONTRACT—EXTRA WORK—LIABILITY. Under a state contract for road construction, entered into with the state highway board, providing that no extra work not included in the specifications or covered in the contract shall be paid for unless done pursuant to the highway commissioner's written direction, after the price therefor shall be agreed upon, the contractor cannot recover for extra work which was merely alleged in his complaint to be required by the state, acting by and through its engineer in charge; the inference being that the extra work was verbally required by the engineer, who had no power to contract on the part of the state.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered January 20, 1914, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Vince H. Faben, for appellant.

The Attorney General and *Edward W. Allen*, Assistant, for respondent.

PARKER, J.—This is an action to recover compensation for extra work which the plaintiff alleges he performed for the state in connection with a contract he had with the state for the clearing and grubbing of a portion of state road No. 1. The state demurred to the plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was, by the court, sustained, and, the plaintiff electing to stand upon his complaint and not plead further, judgment of dismissal was accordingly entered against him. From this disposition of the cause, the plaintiff has appealed.

The controlling facts appearing in appellant's complaint may be summarized as follows: In June, 1908, appellant,

¹Reported in 141 Pac. 314.

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Opinion Per PARKER, J.

being the successful bidder therefor, entered into a contract with the state highway board, for the state, for the clearing and grubbing of a portion of state road No. 1, according to plans and specifications, for which the state agreed to pay him the lump sum of \$3,775. The contract contained, among other things, the following:

"That he [appellant] will furnish all material necessary and perform all labor in the manner and of the kind and class of work and material and manner of doing said work, and in all other respects strictly in accordance with maps, plans and specifications thereof, furnished by the highway commissioner, and on file in the office of the highway commissioner at Olympia, Washington, a copy of said specifications being attached thereto; said maps, plans and specifications being agreed to be a part of this contract, with the same force and effect as though the same were fully inserted herein.

"Said work is to be done under the supervision and direction of the engineer selected by the state highway commissioner, to be approved by the engineer and accepted by the state highway commissioner. Said state highway commissioner shall have the right to fully decide on all questions arising as to the proper performance of said work . . .

"It is further agreed that no liability shall attach to the state by reason of entering into this contract, except as especially provided herein."

The specifications, which are made a part of the contract, contain, among other provisions, the following:

"All brush and timber shall be cut from a strip 20 feet in width, extending ten feet on each side of center line of road, unless it may be necessary to clear a greater width on account of heavy cuts or fills, in which case the clearing shall extend to such width as may be directed by the engineer in charge of the work. . . .

"Should any work be required that in the judgment of the highway commissioner is not included under the specifications, or not covered by the prices named in the contract, such work shall be done pursuant to the highway commissioner's written direction after the price therefor shall have been agreed upon and no extra work will be paid for unless so ordered."

Appellant alleges, in his complaint, the following:

"That in and about the performance of said contract this plaintiff was required by the defendant, acting by and through its engineer in charge of said work, to do and perform certain work as follows, to wit: Plaintiff was required at every turn to clear and grub to a width greater than that required by the contract, and that at various places along the route of said road was required to clear and to grub to a width in excess of that specified by the contract. That said defendant and its agents, the state highway board and state highway commissioner and the engineer in charge have claimed and do claim that all of said work was and is contemplated by said contract, but that said work in truth and in fact was not and is not contemplated or covered by said contract, and was wrongfully and arbitrarily required by the defendant, its said agents and servants under said claim that said work was contemplated and covered by said contract . . .

"That no part of said excess of clearing was rendered necessary by heavy cuts or fills, or either, and that no part of said excess of grubbing was rendered necessary by heavy cuts or fills or either."

This was followed by allegations of the amount of extra work claimed to be so performed and the reasonable value thereof, for which judgment is prayed. These facts, we think, plainly demonstrate that appellant is claiming for extra work which was not ordered to be done by written direction of the highway commissioner at an agreed price, as required by the express provisions of the contract, nor ordered in any manner to be done as extra work or work not within the terms of the contract by the contracting agents of the state, to wit, the state highway board.

This contract was entered into with appellant by the state highway board in pursuance of power given that board by chapter 149, page 294, Laws of 1907. A reading of that law will readily show that the state highway board has the sole power of contract for the state, so far as contracts of the nature here involved are concerned. Neither the highway commissioner nor the engineer has any such power. Their

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powers are only such as are usually possessed by mere supervising engineers and architects; that is, to see that the contract entered into by the owner with the contractor is properly carried out. They are in no sense contracting agents of the state. Reading the allegations of appellant's complaint and the provisions of the contract and specifications together, we think that appellant's claim as here pleaded amounts to nothing more than that the engineer, and possibly the highway commissioner, verbally required the performance of this alleged extra work. Clearly, this would not bind the state to pay for such work, even conceding that it is extra work which the contract contemplated might be paid for if ordered in the manner therein expressly provided, in view of the fact that neither the highway commissioner nor the engineer possessed the power to bind the state in any other manner than that which the contract prescribed. It is also plain from the allegations of the complaint that the work was not directed to be done as extra work, but was directed to be done by the engineer and claimed to be work within the contract which was to be compensated for by the payment of the lump sum bid. If, as a matter of fact, the work was extra work within the terms of the contract which would call for extra compensation, and the engineer or highway commissioner arbitrarily decided that appellant should perform such work as a part of his contract, such fact might be cause for appellant refusing to so perform it without forfeiting his rights under the contract; but it would not follow that appellant could recover compensation for such work after performing the same when it was not directed by the highway commissioner in the manner prescribed by the contract. We do not think the allegations of the complaint show that the state highway board, the state's contracting agent, in any manner directed or authorized the performance of any work other than by the express terms of the contract.

In our recent decision in *Wiley v. Hart*, 74 Wash. 142, 132 Pac. 1015, we had occasion to review the authorities

touching the powers of mere supervising engineers and architects as compared with the powers of contracting agents. Our conclusion there reached is quite in harmony with our conclusion here, that the powers of the highway commissioner and the engineer were only those of supervising engineers or architects, having no powers whatever to act beyond the strict terms of the contract and the supervision of the work being performed in compliance therewith. We think further citation and review of authorities are unnecessary.

The judgment is affirmed.

Crow, C. J., MOUNT, and MORRIS, JJ., concur.

[No. 11955. Department One. June 23, 1914.]

J. M. JORGUSON *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS—DAMAGES—REMOVAL OF LATERAL SUPPORT—NECESSITY OF CLAIMS. Under Seattle city charter, art. 4, § 29, requiring all claims for damages against the city to be filed within thirty days, a claim for damages by the removal of lateral support is a prerequisite to the action, where the city had condemned the right to make the change in grade and to take land sufficient for a one-to-one slope, and paid the compensation, and the damages resulted from the inadequacies of the plan to protect the remaining property from sliding.

SAME—CLAIMS FOR CONTINUING DAMAGES. A claim for continuing damages to abutting property, by reason of a progressive slide caused by the city's removal of lateral support, is within a charter provision requiring "all claims" for damages against the city to be filed within thirty days after such claim accrues; and Rem. & Bal. Code, §§ 7995 and 7997, making the filing of such claims in the manner required by the city charter a mandatory condition precedent to action, no recovery can be had for damages accruing more than thirty days prior to the filing of the claim.

SAME—CONTINUING DAMAGES—FUTURE DAMAGES—INSTRUCTIONS. A charter provision requiring a claim for all damages against a city to be filed within thirty days after the action accrues, does not oper-

¹Reported in 141 Pac. 334.

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ate as a statute of limitations as to continuing damages, and permits of the recovery of future damages, to the day of trial, but the jury are properly instructed that there can be no recovery for damages accruing more than thirty days prior to the filing of the notice.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 20, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

Higgins & Hughes (Hyman Zettler, of counsel), for appellants.

James E. Bradford and *Howard M. Findley*, for respondent.

ELLIS, J.—This is an action to recover damages caused by the sliding of the soil of three lots belonging to plaintiffs, by reason of the regrading of Tenth avenue south, in the city of Seattle. Two of the lots abut upon Twelfth avenue south and the other upon Eleventh avenue south. All lie upon the westerly incline of Beacon Hill. Tenth avenue south, the regrading of which necessitated a cut of over fifty feet, is located at the foot of the incline. This cut was made at a one to one slope upon the abutting property which was condemned for that slope. That slope, from the peculiar character of the soil throughout this section, was found insufficient to sustain itself. A continuing slide resulted, affecting the entire locality, including the property fronting on Twelfth avenue south, and the appellants' lots, two blocks from the regraded street. This is the same improvement and resultant slide which was involved in the case of *Casassa v. Seattle*, which was twice here on appeal, and is reported in 66 Wash. 146, 119 Pac. 13, and 75 Wash. 367, 134 Pac. 1080. For a more complete statement of the facts touching the improvement and locality, reference is made to the opinion in the first *Casassa* appeal.

The regrade of Tenth avenue south was made in 1910. The evidence in this action tended to show that the slide

started with the lots abutting on that street, and has steadily progressed up the hillside till it has now nearly reached Twelfth avenue on the crest of the hill. The plaintiffs' Twelfth avenue lots were reached by the slide early in January, 1913. The rear portion had commenced to crumble and had dropped down a considerable distance before January 16, 1913. The crumbling was still advancing on these lots at the date of the trial in December, 1913. The sliding of the Eleventh avenue lot occurred in 1912. The evidence tended to show that the damage to all of the lots as affecting their market value had been done prior to January 16, 1913. The plaintiffs were made parties to the condemnation suit by reason of any damage which might result to the lots here in question by the regrade interfering with access thereto, but it is apparent that damages from sliding were neither contemplated nor litigated in that action. On February 15, 1913, the plaintiffs filed their notice of claim for damages by the slide.

In submitting the case to the jury, the court instructed upon the theory that the failure of the city in making the regrade to provide adequate means for preventing the slide constituted negligence for the resultant damages from which the city would be liable, but that the claim was one contemplated by § 29, article 4, of the city charter, requiring the presentation to the city council and filing with the city clerk of all claims for damages against the city within thirty days after the claim accrued, and hence, also, within the purview of the act of 1909, Rem. & Bal. Code, §§ 7995, 7996, and 7997 (P. C. 77 §§133, 135, 137). The court therefore instructed the jury that there could be no recovery for any damages which were sustained prior to January 16, 1913, or more than thirty days prior to the time when the plaintiffs filed their claim. The jury found for the defendant. Judgment was entered accordingly. The plaintiffs appeal, assigning as error the above mentioned instructions.

Three questions are presented: (1) Is the filing of a

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claim necessary to the maintenance of an action for damages resulting from the prosecution of a public work where there has been an antecedent condemnation of lands the taking or damaging of which is contemplated by the plan of improvement? (2) Is the filing of a claim necessary in case of progressive injury and continuing damage? (3) If so, is the recovery limited to injuries which accrued within thirty days immediately prior to the filing of the claim?

I. We have already answered the first question in the affirmative in the second *Casassa* appeal, 75 Wash. 367, 134 Pac. 1080. That decision, the appellants contend, is not in harmony with our prior decisions in *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Provident Trust Co. v. Spokane*, 75 Wash. 217, 134 Pac. 927, and *Donofrio v. Seattle*, 72 Wash. 178, 129 Pac. 1094. In each of these three cases, the taking or damaging was an indispensable and intentional part of the improvement, necessarily anticipated by the plan, and intended in the performance, of the work. In neither of these cases was there any antecedent condemnation for the right to take or damage. In all of these cases, the taking or damaging fell within the express limitation of the constitution, upon the power of eminent domain, § 16, article 1, inhibiting the taking or damaging of private property for public or private use without just compensation having first been made or paid into court for the owner. This provision has sole reference to such taking or damaging as is contemplated in the exercise of the power of eminent domain. It is a mere limitation upon the otherwise unlimited sovereign power to take or damage private property for public use. *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994. Without this constitutional limitation, the state could have delegated to the city the power to take or damage private property for public use *without compensation*, and such a taking or damaging would be no tort, nor have in it any element of tort. The

wrong in such a taking without compensation consists, not in a tortious taking, but in the failure to perform a condition precedent imposed by the constitution upon the exercise of a sovereign right. It is the right of the property owner to insist upon the observance of this antecedent condition alone which, in the foregoing cases, we held protected by this particular provision of the constitution; not every invasion of a property right, when we said in the *Kincaid* case, that "it would violate the constitutional right of the property owner if he were required to initiate his right to compensation by any affirmative act." It was with reference to that right alone that we there said:

"The city is bound to make compensation under a compact no less formal than the constitution itself, and it cannot defeat this constitutional right by a charter provision or an ordinance, nor can the legislature take it away by any arbitrary requirement, although we may admit that it could, as in all other cases, fix a time within which an action must be brought to recover damages that have not been first ascertained and paid."

The true basis of the decision, and the sum of our holding in the *Kincaid* case, is clearly stated early in the opinion as follows:

"Whatever its method, the city has taken respondent's property for a public use in virtue of its sovereignty, and subject only to the limitations to be found in the constitution. When taking private property for a public use, the state acts in its sovereign capacity. *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. It goes not as a trespasser, inspired by selfish or unlawful motive, but as one taking without malice or intent to do wrong and presumptively for the public good. It cannot put on the cloak of a tortfeasor under the statute if it would. It cannot plead a wilful wrong to defeat a just claim."

The above mentioned provision of the constitution was never intended to apply to consequential or resultant damages not anticipated in, nor a part of, the plan of a public work.

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It was never intended to apply to damages resulting to private property from the negligent or wrongful use of public property. As to such damages, tortious in their very inception, the injured person is remitted to his remedy on the case, as in other cases of tortious taking or injury. For example: Suppose, in the prosecution of an improvement, the city unnecessarily and negligently temporarily obstructs the ingress, or egress, or the access of light and air to private property neither taken nor in any manner required in the prosecution of the work. It is obvious that this would be an invasion of a property right, but not a taking or damaging within the meaning of the constitutional limitation upon the power of eminent domain. It would be a tort, pure and simple, for which an action for damages would lie independently of the constitutional limitation. Again, suppose the city, in improving a street or a city park, set off a blast which cast stones upon private property, littering the lawn or injuring the buildings. This would be also a simple tort, and nothing else, for which an action would lie and be protected by the due process clause of the constitution, even were § 16 of article 1 eliminated from that instrument. Of course, in the broad sense, the constitution, by the due process clause, protects every property right from tortious invasion, but that clause must not be confounded with the clause above mentioned, which is intended only as a limitation upon the otherwise unlimited sovereign power of eminent domain, not as extending an additional guaranty as against negligence or tortious wrongs or ordinary breaches of contract by municipal corporations. Herein lies the distinction between the *Kincaid* case and the *Casassa* case. If it is lawful for the city, through its charter, or for the legislature, by statute, to require the filing of a claim as a condition to the maintenance of an action against the city for any tortious injury, then it follows, of necessity, that such a claim may be required in a case like that here presented, since both are protected only by the due process clause of the constitution,

and the requirement of such a claim, if reasonable in time, is not a denial of due process of law. The writer of this opinion believes that this answers the dissent of Judge Gose from the original opinion in the *Kincaid* case (74 Wash. 627, 134 Pac. 504), where it is said, "If it [the action] sounds in tort, the statute governs; if it is upon contract, it is controlled by the city charter." That, of course, is true, but where the taking or damaging is contemplated by the plan of the work and is a necessary incident to the making of the public improvement, then the owner's action, strictly speaking, rests neither in tort nor contract. It is merely a mode of supplying the lack of performance by the city itself of a condition precedent by a subsequent action at the instance of the owner. The compensation recovered in such an action is no more damage for tort or breach of contract than it would have been if awarded in an antecedent action. As pointed out in the *Kincaid* case and the *Casassa* case, the sum of the distinction lies in the fact that, where there is a taking or damaging of property, the use of which is contemplated in the plan of the improvement, that taking is not tortious.

These considerations make it plain that this case is controlled by our decision in the second *Casassa* case, 75 Wash. 367, 134 Pac. 1080. In that case, the injury for which the claim was filed and for which the suit was brought was caused by the incipient stages of the same slide as that here involved. The trial court excluded evidence of an item of damages because that item was not specified in the claim filed with the city as required by § 29, article 4, of the city charter. Holding this no error, we said:

"For the full text of this charter provision and the character of claims which have been held to be included within its purview, reference is made to the following decisions: *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107; *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152; *Id.*, 74 Wash. 662, 134 Pac. 502; *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, Ann. Cas. 1913 A. 344, 34 L. R. A. (N. S.)

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1166. Under these decisions, the presentation and filing of the claim was an indispensable prerequisite to the maintenance of this action. They unequivocally hold that the charter provision applies to all claims for damages. This view does not impinge our decision in the recent case of *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, in which we held that, where property was taken or damaged without any antecedent condemnation, it was none the less a taking in the exercise of a sovereign function, hence not tortious. For that reason, we held that the city could not impute to its own lawful act a tortious character in order to avoid liability by pleading the failure of the plaintiff to present and file a claim pursuant to the charter as a defense to the plaintiffs' action to assess the damages for such lawful taking which should have been assessed in advance. On that ground, we held that to require the presentation of the claim as a prerequisite to the action in such a case would violate § 16, art. 1 of the state constitution, providing that property shall not be taken for public use without compensation."

The foregoing quotation is a mere paraphrase of the language last above quoted from the *Kincaid* case. It was before this court *En Banc* on the rehearing of the *Kincaid* case. That the opinion in the *Casassa* case correctly pointed out the true basis and scope of the decision in the *Kincaid* case, as the court *En Banc* then conceived, is manifested by its citation in the opinion on rehearing in the *Kincaid* case, 74 Wash. 628, 135 Pac. 820, without adverse comment. Considered in its relation to the original opinion and its subject-matter, nothing said in the opinion on rehearing can be construed as extending the doctrine of the *Kincaid* case to purely tortious injuries to private property occasioned by the prosecution of a public work. It may sometimes be thought that we too laboriously explain reasonably clear distinctions. The failure of able counsel to grasp the distinction briefly pointed out in the second *Casassa* opinion, which they now vigorously assail, seems to justify the more laborious course.

II. Is the filing of a claim necessary in case of progressive injury and continuing damages? This question must

also be answered in the affirmative. The city charter, article 4, § 29, provides that "all claims for damages against the city must be presented to the city council and filed with the city clerk within 30 days after the time when such claim for damages accrued, etc." The statute, Rem. & Bal. Code, § 7995 (P. C. 77 § 133), provides that whenever a claim for damages sounding in tort against any city of the first class is filed in compliance with a valid charter provision of such city, the claim must contain, in addition to the charter requirements, a statement of the residence of the claimant by street and number at the time of filing such claim, and for six months prior to the accrual of the claim for damages, and § 7997 (P. C. 77 § 137) declares that compliance with the provisions of the act is mandatory. It will be noted that neither the charter provision nor the statute, which was evidently passed in aid of such charter provisions, makes any exception of claims for continuing damages. The charter provision says "all claims." The statute applies to all valid charter provisions. As stated in our most recent utterance upon the subject, *Hall v. Spokane*, 79 Wash. 303, 140 Pac. 348:

"These statutes are so plain and unequivocal that they leave no room for construction. They require a compliance with both the statute and the charter."

In *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365, upon a careful review of our own decisions and decisions from other jurisdictions, we felt ourselves compelled, by the express terms of the statute, to hold the filing of the claim therein provided for an indispensable prerequisite to the maintenance of an action, quoting the following language from *Ellis v. Kearney*, 80 Neb. 51, 113 N. W. 803: "It is not the province of the courts to make the law or read into it exceptions not intended by the lawmakers." There is nothing more unreasonable in the requirement of a claim in case of continuing or progressive damages than in other cases. Within thirty days after the commencement of a pro-

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gressive injury, a plaintiff is just as able to file a claim for the damages already incurred and those likely to ensue as he will ever be. As remarked in *Hieber v. Spokane*, 73 Wash. 122, 131 Pac. 478, a notice reciting a claim for continuing damages sufficiently complies with both charter and statutory provisions as to subsequent damages, provided it is sufficient in other particulars. That a claim is necessary in case of continuing damage, we also held in *Connor v. Seattle*, 76 Wash. 37, 135 Pac. 617. While it is true that no claim is necessary as a condition precedent to the maintenance of an action to restrain a continuing trespass in the nature of nuisance (*Kiser v. Douglas County*, 70 Wash. 242, 126 Pac. 622), the reason is that both statute and charter provisions contemplate only claims for damages, and not equitable actions to restrain continuing nuisances. There is a reason why neither statute nor charter provision makes an exception to the requirement of notice in case of continuing damages. The public, which must eventually pay the damages, is entitled to timely notice that damages have commenced and are likely to continue, so that the public agents, the officers of the city, may take the necessary steps to stop the progress of the injury and minimize the consequent damages. The reasons for notice are as cogent in case of continuing damages as in other cases. Neither statute nor charter having made an exception as to such damages, this court has no power to engraft an exception upon them by construction. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365. Their application to continuing damages being in no sense unreasonable, we are constrained to hold that both the statute and the charter make the filing of the claim in such cases mandatory.

III. We find no error in the court's instruction that the plaintiff could not recover for any damages sustained prior to January 16, 1913, or more than thirty days prior to the filing of the claim. The appellants contend that the effect of this ruling was to make the claim provision a thirty-day statute of limitations for damages accruing from a continuing

injury. As already indicated, a claim of damages is sufficient to cover a continuing injury, and meets both the letter and spirit of the statute as to future injuries if it points out the continuing injury, and lays claim to the continuing damages. As to future damages, such a claim effects the full purpose of the statute in that it gives notice. As to past damages, it has no such effect. It gives no notice to the city in time to enable it to arrest the progress of the injury or take any steps looking to a minimization of the damages, which is the prime purpose of the notice as applied to injuries of this character. The claim that this construction operates as a special statute of limitations is more apparent than real. It merely imposes, as an additional condition to the maintenance of the action, the giving of notice of the claim for damages. That notice being given, the right of action is still governed by the appropriate statute of limitations. The only restraint upon the city in its power to require notice is that the requirement be reasonable and that it shall not infringe the constitutional guaranty of due process of law. The limitation of the recovery, even in cases of continuing injury, as to damages accruing prior to the filing of the claim to the period of thirty days, is as reasonable and necessary in cases of continuing injury as in other cases.

The requirement of reasonable notice is not subject to the ban of the due process clause of the constitution. We find nothing in the case of *Doran v. Seattle*, 24 Wash. 182, 64 Pac. 230, 85 Am. St. 948, 54 L. R. A. 532, militating against this view. That case merely holds that the injured party may recover damages for continuing injury as often as he brings action therefor, and is not confined by the statute of limitations to two years after the initial damage is sustained. The case has no direct relation to the question here involved. Construing the charter provision as applicable to all claims for damages and the statute as making the filing of the claim mandatory, as we do, it is manifest that the plaintiffs were only entitled to recover such damages as they were able to

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show they had suffered from the 16th day of January, 1913, up to, and including, the date of trial. The court, in effect, so instructed the jury. The jury must have found upon these instructions that no damages had been suffered since that time. There was evidence to support the finding. There being no error in the instructions, we cannot disturb the verdict.

The judgment is affirmed.

Crow, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 11956. Department One. June 23, 1914.]

H. P. DECKER *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS—REQUISITES—RESIDENCE OF CLAIMANT. Rem. & Bal. Code, § 7995, requiring claims for damages against a city of the first class to be filed in compliance with valid charter provisions, and that the claim shall contain a statement of the actual residence of the claimant "at the date of presenting and filing the claims," and also for six months prior to the accrual thereof, is substantially complied with by a claim stating the residence for a year "last past" at the time of the verification of the claim, which was three days before it was filed; and is sufficient to admit proof of the same residence at the time of the filing.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 6, 1914, dismissing an action in tort, upon granting a nonsuit, after a trial before the court and a jury. Reversed.

Higgins & Hughes (Hyman Zettler, of counsel), for appellants.

James E. Bradford and *Howard M. Findley*, for respondent.

ELLIS, J.—This case presents the same questions as those involved in *Jorguson v. Seattle*, *ante* p. 126, 141 Pac. 334,

¹Reported in 141 Pac. 338.

and is, in the main, controlled by that decision. The only additional question is as to the sufficiency of the claim presented to the city council and filed with the city clerk. This claim was verified on February 12, 1913, and was presented and filed February 15, 1913. It contained the statement "that the claimants' residence for one year last past has been and now is No. 1122, Tenth avenue south, Seattle, Washington." The uncontradicted evidence was to the effect that the residence of the plaintiffs on February 12, 1913, when the claim was verified, was, in fact, No. 1122 Tenth avenue south, in the city of Seattle, Washington, and so continued at the time the claim was presented and filed on February 15, 1913, and for a long period subsequent thereto. The trial court held the notice of claim insufficient in that it spoke as of the date of the verification, three days before it was filed, hence did not meet the requirement of the statute, Rem. & Bal. Code, § 7995 (P. C. 77 § 133), which provides that every claim for damages sounding in tort, filed in compliance with valid charter provisions of any city of the first class, shall contain, in addition to the valid requirements of the charter, "a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued." The court dismissed the action. The plaintiffs appealed.

In support of the judgment, the respondent urges that the claim was fatally defective, citing cases in which this court has held that the above quoted provisions of the statute are mandatory, that a compliance therewith is "a condition precedent to the bringing of the action and that the giving of the notice in substantial compliance with the statute must be alleged and proven." *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840; *Connor v. Seattle*, 76 Wash.

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87, 135 Pac. 617; *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58.

In the *Ransom* case, the claim was not filed until seventy-three days after the accident. In the *Collins* case, the claim contained none of the statutory requirements. In the *Connor* case, and also in the *Benson* case, the claim contained no reference whatever to the claimants' place of residence. It is obvious that in none of these cases was there any compliance with the statute, substantial or otherwise. We have never held that even a mandatory requirement may not be met by a substantial, though not an exact, nice and literal compliance. In *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449, we said:

"The obvious purpose of the charter provision is to insure such notice as will enable the city, through its proper officials, to investigate the cause and character of the injury while the facts are comparatively recent, and thus protect itself against fraudulent or exaggerated claims. This court, in common with many others, has held that, where there is a *bona fide* effort to comply with the law, and the notice filed actually accomplished the purpose of notice as to the place and character of the defect in the street, it is sufficient though defective, if the deficiencies therein are not such as to be actually misleading. *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Fall-din v. Seattle*, 50 Wash. 561, 97 Pac. 658. This court has also held that claims of this character are to be viewed with at least that liberality which is accorded to a pleading. *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938. These and many other decisions which might be cited, show that this court has never adopted that Draconic strictness of construction which would sacrifice the just and reasonable purpose of the law to a technical exactness of terms, making it a pitfall for the ignorant and unskillful, rather than a reasonable protection against the fraudulent and designing."

In *Frasier v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459, we said:

"The purpose of these provisions, as applied to a claim arising from a tort, is to enable the municipality to investi-

gate both the claim and the claimant while the occurrence is recent and the evidence available, to the end that it may protect itself against spurious and unjust claims. When the claim substantially complies with the legislative requirement and these ends are subserved, the claim has accomplished the purpose intended."

In *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893, this court said:

"The object is to give information, and, when that information is given in a practicable manner, the requirements of the law are met. Mr. Thompson, in his Commentaries on the Law of Negligence, Vol. 5, § 6330, voices the almost uniform sentiment of the courts on this subject in the following statement:

"It is manifestly sufficient if, in such a notice, the *place* where the accident took place is described so as to identify it with *reasonable certainty*, and so that the proper investigating officer can *find it from the description*, aided by a reasonable inquiry, and that it is not calculated to mislead. Clearly, such a notice sufficiently designates the place of the accident when its descriptive words are such that, with the notice in hand, there can be no trouble in finding the place. On the other hand, it seems to be a just conclusion that, as it is the purpose of such statutes to furnish the proper municipal officers with the same facilities for ascertaining the condition of the place causing the injury that the injured party has or reasonably could have, the notice given by him *ought to be sufficient to that end*. Moreover, where there has been a *bona fide* effort to comply with the statute and there has been *no intention to mislead*, it is a sound and just rule which opens the door of the court to an inquiry whether the notice *did in fact mislead*. If it did not in fact mislead, but if its deficiencies or mistakes were helped out by other information given to the proper officers, or by other knowledge on their part, no matter how acquired, then it would turn the statute into a mere trap for the ignorant and unskillful, to deprive them of a right of action because of failing to do something, which caused the municipality no injury and put it to no disadvantage.'"

See, also, *King v. Spokane*, 52 Wash. 601, 100 Pac. 997; *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658; *Ellis v. Se-*

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attle, 47 Wash. 578, 92 Pac. 431. In the present instance, the interval between the date of the verification and filing of the claim was so short as to constitute a substantial compliance with the statute. In such a case, it is only reasonable to permit the claim to be supplemented by proof that the place of residence was not changed in the interval. So supplemented, the claim, obviously, was not, and could not have been, misleading. It performed its true function, that of notice.

The judgment is reversed, and the cause is remanded for trial.

Crow, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

[No. 11954. Department One. June 23, 1914.]

L. C. BANE *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS—REQUISITES — RESIDENCE OF CLAIMANTS. A claim for damages against the city of Seattle, a city of the first class, stating the residence of the claimants by street and number, without stating the name of the city, the venue of the jurat of the claim being laid in King county, sufficiently complies with Rem. & Bal. Code, § 7995, requiring the claim to state the actual residence of the claimants "by street and number," in the absence of a showing that the failure to name the city, county and state was misleading.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 6, 1914, dismissing an action in tort, upon granting a nonsuit, after a trial before the court and a jury. Reversed.

Higgins & Hughes (Hyman Zettler, of counsel), for appellants.

James E. Bradford and *Howard M. Findley*, for respondent.

¹Reported in 141 Pac. 339.

PER CURIAM.—This appeal presents the same questions as those involved in *Jorguson v. Seattle*, ante p. 126, 141 Pac. 334, and *Decker v. Seattle*, ante p. 137, 141 Pac. 338. The notice, which was verified on February 12, 1913, and filed on February 15, 1913, stated the cause of action as alleged in the complaint, and contained the following statement of residence:

“That the residence for one year last past of claimant is as follows: L. C. Bane, 2134 Laurelstrade Ave; W. V. Bane, Hotel Kennedy; Josephine Bane, 412 - 21st Ave.”

The case is controlled, in the main, by the decisions in the above cases. The only additional question presented in this case is the claim that the notice presented to the city council and filed with the city clerk was fatally defective in that it failed to state that the plaintiffs' place of residence was in the city of Seattle. The venue of the *jurat* to the claim was laid in King county. The claim was filed with the city clerk. It complied with the letter of the statute in that it contained “a statement of the actual residence of such claimant by street and number.” In the absence of a showing that the failure to name the city, county, and state was misleading, we hold that the claim substantially complied with the statute.

The judgment is reversed.

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Opinion Per PARKER, J.

[No. 11973. Department Two. June 23, 1914.]

H. BARKER *et al.*, Respondents, v. EMIL PFUND *et al.*,
*Appellants.*¹

BILLS AND NOTES—BONA FIDE PURCHASER—NOTICE. Creditors of a trust estate who were beneficiaries of the trust, are not *bona fide* purchasers of a note, sold to them by the trustee, with outstanding equities against it, where they participated in the trust, knew its purposes and conditions, and knew of the terms and conditions creating the outstanding equities in favor of the makers; hence they stand in the position of the trustee as to such equities in favor of the makers.

TRUSTS—SALES OF TRUST ESTATE—RIGHTS OF PURCHASER—NOTICE—CAVEAT EMPTOR. Where a trustee for creditors sold a lot belonging to the trust estate, for the sum of \$4,750, agreeing with the purchaser to satisfy an existing mortgage for \$4,000 which was a lien upon the lot and other property, the purchasers giving back a purchase money mortgage in reliance upon the representations that the prior mortgage would be paid, neither the trustee nor a holder of such purchase money mortgage with notice can foreclose the same without first extinguishing and satisfying the prior lien, on the theory that the purchaser bought at his peril; since the doctrine of *caveat emptor* in judicial sales has no application where the sale was made for the purpose of satisfying the lien with which the property was burdened.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered January 2, 1914, decreeing the foreclosure of a mortgage and dismissing a cross-complaint, upon sustaining demurrers to affirmative defenses and the cross-complaint. Reversed.

A. Emerson Cross, for appellants.

T. H. McKay, for respondents.

PARKER, J.—This action was originally commenced in the superior court by Barker and son, assignees of the trustee for Waldron and wife, and their creditors, against Pfund and wife, to foreclose a mortgage executed by Pfund and wife to

¹Reported in 141 Pac. 327. .

the trustee, upon a lot in Aberdeen, to secure the purchase price thereof. Thereafter, J. B. Benson, the present trustee, successor to W. I. Agnew, deceased, the original trustee, was by order of the superior court, made a party defendant upon the filing of the affirmative answer and cross-complaint of Pfund and wife. The question presented here is as to the sufficiency of the affirmative answer and cross-complaint of Pfund and wife as constituting a defense and grounds for the relief prayed for by them, as against the demurrers thereto of Barker and son, and Benson the trustee. These demurrers were, by the court, sustained, when, Pfund and wife electing to stand upon their answer and cross-complaint and not plead further, judgment of foreclosure was rendered against them as prayed for by Barker and son. From this disposition of the cause, Pfund and wife have appealed. Barker and son have filed an answering brief. Benson, trustee, has not filed any answering brief.

The complaint of Barker and son presents a case of simple mortgage foreclosure, alleging, in substance, that on July 5, 1910, Pfund and wife executed and delivered to W. I. Agnew, as trustee, four certain promissory notes, of \$500 each, payable in fifteen, eighteen, twenty, and twenty-four months after date, respectively; that, to secure the payment of these notes, together with certain other notes executed by Pfund and wife to Agnew as trustee, aggregating, in all, \$4,750, Pfund and wife executed and delivered to Agnew, as trustee, a mortgage upon lot 12, block 67, of Weatherwax & Benn's Second Addition to the city of Aberdeen; that these four notes were assigned and transferred by Agnew, trustee, to Barker and son before the commencement of this action, resulting in an equitable assignment of the mortgage; and that so much of the debt as is evidenced by these four notes is unpaid, for which foreclosure is prayed.

The amended affirmative defense and cross-complaint of Pfund and wife is quite voluminous, and alleges a state of facts somewhat involved. So far as material here, these facts

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may be summarized as follows: On May 24, 1909, H. B. Waldron and wife executed and delivered to W. I. Agnew a trust deed, which, in so far as we need here notice its terms, conditions and recitals, is as follows:

"Witnesseth: that the said parties of the first part, in consideration of the sum of \$1 and other valuable considerations and services to be done and performed by the second party, the said parties of the first part do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, in trust for the benefit of the said parties of the following estate, lying and being in the county of Chehalis, state of Washington, described as follows, to wit:

"Lots 5, 6, 7, 8 and 10, block 56; also lot 12, block 67; all in Weatherwax & Benn's Second Addition to the city of Aberdeen, Chehalis county, Washington; also lots 4, 5, 6, 7, 8, 9, 10, 11 and 12, block 21, Campbell's Addition to the city of Hoquiam, Chehalis county, Washington, with the hereditaments and appurtenances thereunto belonging or appertaining, together with the rents, issues and profits thereof; also that this deed is a trust deed for the purpose of placing the property described, under the control of the second party for a sale and disposition of the same, or sufficient thereof to pay the indebtedness hereinafter scheduled, but that no sale thereof can be made by the trustee, the second party hereunder during the period of one year from the date hereof less than the following prices, unless the parties of the first part join with the said trustee in the execution of the deeds therefor, to wit:

Lot 10, block 56, together with the improvements and furnishings	\$1,600.00
Lots 5 and 6, block 56	4,250.00
Lot 12, block 67	4,500.00
Lots 4 to 12, inclusive, Hoquiam, Campbell's Addition	900.00
for inside lots and \$1,250.00 for corners or \$9,000.00 in one parcel.	

"The second party to have and to hold said property for the purpose of satisfying and cancelling the indebtedness hereinafter scheduled, and for which purpose this trust is created.

"The said party of the second part to have the right to sell any part or portion of said premises for the purpose of

realizing sufficient moneys to pay and satisfy the said indebtedness and for that purpose to make and execute deeds to any portion of said premises with the full covenants and warranty that no sale of any portion of said premises shall be made without full notification to the creditors scheduled herein and the consent of a majority thereof to such sale and the said parties of the first part agree to execute and deliver if necessary such conveyance, by way of deeds or otherwise as may be necessary to satisfy the demand of any intending purchaser.

"The said party of the second part hereby agrees with the said parties of the first part that he will accept the title to the said property in trust. That he will control and manage the same to the end that all income arising from said property shall be applied, first, to the payment of the taxes, second, insurance, third, interest on mortgages on the said real estate; and all amounts remaining above expenses shall be applied *pro rata* upon the indebtedness, giving preference to such debts as are now secured by mortgage upon said property to the end that the income may be applied to release and pay the amount due and owing from said first parties to the following person, to wit:

Mrs. C. E. Burrows, Mortgage, Hotel Waldron..	\$5,000.00
H. L. Cook & Co., Mortgage, Residence.....	1,600.00
George B. Hopkins, Mortgage, cor. Jefferson....	1,000.00
Ella Waldron, Mortgage, Hoquiam property....	4,000.00

Unsecured claims.

Hartung & Norin Co.....	\$ 635.00
Gabrielson & Holmer.....	545.00
Kaufman Bros.	600.00
H. Barker & Son.....	1,518.89
Hayes & Hayes, Bankers.....	3,434.10
S. E. Slade Lumber Company.....	1,175.42
Aberdeen State Bank.....	952.54

"That in addition thereto, he, the second party, will endeavor to secure for the parties of the first part a loan or loans upon the property held by him in trust for the purpose of concentrating the indebtedness into a few claims and at as low rate of interest as is possible; and the said parties for such purpose agree to execute such encumbrances by way of mortgage as may be necessary and deemed advisable by the second party to carry out such intentions.

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"The second party further agrees that he will faithfully perform his trust, and that upon the discharge thereof he will reconvey said property, upon payment to him of such legitimate charges and expenses incurred by him in carrying out the terms of this trust, together with a reasonable compensation for his services in regard thereto, except that said party shall only be holden to reconvey such property as may remain in trust after satisfying the indebtedness set out, out of the property received by him.

"Said first parties also agree to use their best endeavors to assist the said second party and the creditors to obtain purchasers for the property and all proceeds from any sales shall be paid to second party and distributed by him amongst the creditors under this trust."

In June, 1910, Agnew, as trustee, offered and proposed to sell to Pfund and wife lot 12, block 67, Weatherwax & Benn's Second Addition to Aberdeen, of the trust property "free and clear of all liens and encumbrances" for the sum of \$4,750, "said sum being the reasonable and full value" thereof. As evidence of his authority for making such sale as trustee, Agnew exhibited to Pfund and wife an abstract of title to this lot, showing the provisions, conditions and recitals of the trust deed, showing also that the lot was subject to a mortgage for the sum of \$4,000 in favor of one Ella Waldron of the state of Wisconsin. Pfund and wife were then assured by Agnew, as trustee, that, in the event that they would purchase the lot for \$4,750, they would receive a deed thereof, free and clear of any and all encumbrances, and particularly free and clear of the \$4,000 mortgage of Ella Waldron. Pfund and wife, relying upon the provisions and conditions of the trust deed, and the representations made by Agnew, as trustee, that the encumbrances against the lot, and particularly the mortgage of Ella Waldron, would, upon the completion of the purchase, be satisfied and discharged, agreed to purchase the lot and pay therefor the sum of \$4,750. At the same time, and as one transaction, Agnew delivered to Pfund and wife a deed for the lot, containing full covenants and warranty, executed by H. B. Waldron and wife, grant-

ors in the trust deed, and also himself, as trustee, executed and delivered a deed for the lot to Pfund and wife. Thereupon, Pfund and wife, "with full reliance upon, and still relying upon the conditions of the trust deed, and the representations, covenants and agreements of said trustee, as heretofore made, and as contained in said deeds of conveyances, accepted the said deeds of conveyances" and thereupon as full consideration for the lot, free and clear of all encumbrances, made, executed, and delivered to Agnew, as trustee, their certain promissory notes, including the notes here involved, for the aggregate sum of \$4,750, and secured payment thereof by the execution of the mortgage upon the lot here involved. Pfund and wife executed all of these notes and the mortgage securing the same without any consideration whatever save as above stated.

H. Barker and son, these plaintiffs and respondents, are the same H. Barker and son mentioned in the trust deed to Agnew, as creditors of J. B. Waldron and wife. They were active in bringing about the making of the trust deed and the creation of the trust, and had personal knowledge of the provisions, conditions, and recitals contained in the trust deed. They also knew that the reasonable market value of this lot, therein mentioned, sold to Pfund and wife, did not exceed \$4,750, the purchase price thereof paid by Pfund and wife to Agnew as trustee by execution of the notes and mortgage for that sum. Barker and son also knew that Pfund and wife were entitled to have this lot clear and free from all encumbrances, and that the \$4,000 mortgage in favor of Ella Waldron was to be satisfied by Agnew, as trustee, in so far as it was a lien thereon, upon completion of the sale thereof to Pfund and wife. Notwithstanding the conditions, provisions, and recitals in the trust deed; the covenants, agreements and representations made to Pfund and wife by Agnew, as trustee, as inducement for them to purchase this lot and to execute the notes and mortgage in payment thereof; the knowledge of Barker and son relative thereto, and the active participa-

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tion of Barker and son in the creation of the trust; Barker and son procured from Agnew, as trustee, an assignment of the notes involved in this action, knowing that the \$4,000 mortgage of Ella Waldron upon lot 12, against which the agreements and covenants to Pfund and wife had been made, had not been paid, and that Pfund and wife would receive nothing as consideration for the notes and mortgage given by them in payment of the lot, unless the mortgage to Ella Waldron be satisfied as the trustee was bound to do. Barker and son, by procuring the assignment of these notes from Agnew, as trustee, "seek to divert the trust fund evidenced by said notes, and mortgage, made the subject of this action, and to wrongfully take an inequitable, unjust and unconscionable advantage of these answering defendants and cross-complainants." Pfund and wife have paid upon the indebtedness evidenced by the notes and mortgage given by them as the purchase price of the lot \$2,300, and have received nothing therefor as yet, except the naked title to the encumbered lot which, with the \$4,000 Ella Waldron mortgage and accumulated interest thereof, is of no value whatsoever; all of which was well known to Barker and son before commencing this action. If the terms and conditions of the trust deed had been carried out by the trustee and the mortgage of Ella Waldron upon the lot satisfied and discharged in so far as it was a lien thereon, Pfund and wife would have long since paid the notes sued upon in this action.

The mortgage of Ella Waldron is a lien upon, and covers lots 4 to 12, inclusive, block 21, Campbell's addition to Hoquiam, as well as lot 12, block 67, Weatherwax & Benn's Addition to Aberdeen, sold by Agnew, as trustee, to Pfund and wife. Of the property conveyed to Agnew by the trust deed, there remains in the trust lots 4 to 12, inclusive, block 21, Campbell's Addition to Hoquiam, upon which the mortgage of Ella Waldron is also a lien superior to the claims of the trust, which lots are of sufficient value to satisfy that mortgage if sold by the present trustee under order of the court.

This is the only property remaining undisposed of, belonging to the trust estate. E. B. Waldron and wife are insolvent and unable to respond in damages for the breach of their covenants of warranty contained in their deed executed by them and delivered by the trustee to Pfund and wife, together with the deed from Agnew, as trustee, to Pfund and wife for lot 12, block 67, Weatherwax & Benn's Addition.

Since the execution of the trust deed, Pfund and wife have made payment to the extent of \$2,300 upon the indebtedness evidenced by their notes given in payment of lot 12. Agnew has died since then, and J. B. Benson has been, by the superior court, duly appointed trustee, succeeding to all the powers and duties of Agnew as such. The \$4,000 mortgage of Ella Waldron upon lot 12 and upon the Hoquiam lots is past due and unpaid. Benson, as trustee, has power to sell lots 4 to 12, inclusive, of block 21, Campbell's Addition to Hoquiam, and, by such sale, could satisfy the mortgage of Ella Waldron, and thus clear the title of Pfund and wife to lot 12. In concluding their affirmative defense and cross-complaint, Pfund and wife pray for relief as follows:

"(1) That the plaintiffs take nothing by their suit and that the assignment of the notes made the subject of this action from the trustee, W. I. Agnew, to the plaintiffs be cancelled and the notes so cancelled be surrendered up to these answering defendants; unless within such time as this court may prescribe, the plaintiffs, individually, or in connection with the defendant J. B. Benson as trustee, cancel or cause to be cancelled of record and satisfied of record the mortgage and indebtedness upon said lot 12, in block 67 aforesaid, involved in this suit, to the end that these answering defendants and cross-complainants have and recover a clear and perfect title to the property last referred to, in which event, last aforesaid, these defendants and cross-complainants stand ready and willing to pay the mortgage indebtedness involved in this suit.

"(2) That in case the plaintiffs in this suit and the defendant trustee herein, are unable or refuse, jointly or severally, to clear, or cause to be cleared, the title to said lot 12, in block 67, Weatherwax & Benn's Second Addition, afore-

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said, then and in that event, these answering defendants and cross-complainants, in addition to having the notes and mortgage made the subject of plaintiff's action surrendered up and cancelled, as aforesaid, pray that the defendants and cross complainants, have and recover herein judgment in the sum of Two Thousand Three Hundred Dollars for money paid as herein set forth, together with interest on such payments from the time of each partial payment until the time of trial, at the rate of eight (8) per cent per annum.

"(3) That the chancellor by order, judgment and decree made and entered herein direct a sale by the said trustee of lots 4 to 12, inclusive, in block 21, Campbell's Addition, aforesaid, to the end that the mortgage indebtedness of the said Ella Waldron embracing the property involved in this suit, be discharged with the proceeds of such sale, if sufficient therefor.

"(4) That these answering defendants and cross-complainants have their costs herein, and that they receive such other and further relief in the premises as to the judgment and conscience of the court may seem just and equitable."

Proceeding, as we must in our present inquiry, upon the assumption that these allegations of the answer and cross-complaint of Pfund and wife are true, it seems quite plain to us that Barker and son stand in the shoes of the trustee to whom the notes and mortgage were given by Pfund and wife for the purchase price of lot 12, sold to them by Agnew as trustee. Barker and son actively participated in the creation of this trust, knew its purpose, terms, and conditions, were beneficiaries thereof, knew of the representations, terms and conditions attending the sale of lot 12 to Pfund and wife by Agnew as trustee, knew of the existence of the Ella Waldron mortgage as a lien upon that lot, and knew of all of the rights possessed by Pfund and wife as against the trustee, the trust estate, and H. B. Waldron and wife. Possessing all of this knowledge, Barker and son took these notes by assignment from Agnew as trustee. Clearly, they were not innocent purchasers thereof, but took the notes subject to the defenses that might be made against their collection and the foreclos-

ure of the mortgage given to secure them in the hands of the trustee. Our problem, then, is, in substance, the same as if this were an attempted foreclosure by the trustee.

Counsel for respondents Barker and son invoke the rule of *caveat emptor*, and argue that Pfund and wife only acquired the interest of the trust estate, subject to the Ella Waldron mortgage without recourse against the trust estate for failure of the trustee to satisfy that mortgage, seeking vigorous application of the rule of *caveat emptor* as applied generally to sales made by executors, administrators and trustees and judicial sales, where the interest of the trust estate or judgment debtor alone is sold for the purpose of satisfying claims other than some particular lien against the property so sold. Counsel seem to presume, and, we think, correctly, that the title acquired by Pfund and wife to this lot was, in fact, acquired by the deed of Agnew as trustee, and that the accompanying deed from H. B. Waldron and wife to Pfund and wife was little else than the giving of their approval of the sale and conveyance made by Agnew as trustee to Pfund and wife. The fallacy of counsel's argument in seeking to invoke the doctrine of *caveat emptor* here, we think, is rendered manifest by the fact that the sale made by Agnew as trustee to Pfund and wife of this lot was for the purpose, among others, of extinguishing and satisfying this very mortgage lien of Ella Waldron against the lot. To apply the doctrine of *caveat emptor*, as here sought by counsel, would be like applying it to a judicial sale in a mortgage foreclosure with a view to having the purchaser take the property still burdened with the mortgage foreclosed. It would be little short of absurd to hold that a purchaser at such a sale, though subject to the rule of *caveat emptor*, generally speaking, would acquire the property still subject to the very mortgage which the sale was made to satisfy.

If the prayer of Pfund and wife in their answer and cross-complaint amounted simply to a claim of nonliability at all events, upon the notes here sued upon, there would probably

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be ground for the sustaining of the demurrers of Barker and son and the trustee. But, manifestly, Pfund and wife are simply seeking to protect themselves from a situation which is threatening their rights and which was brought about by acts of the trustee and Barker and son; and which will result in at least a legal fraud being perpetrated upon them unless their rights are protected by proper judgment and decree of the court. We are of the opinion that the allegations of the answer and cross-complaint of Pfund and wife show a state of facts entitling them to relief; either in some of the alternative forms prayed for, or in some other appropriate form within their general prayer. We conclude that the trial court erred in sustaining the demurrers to the answer and cross-complaint, and that the judgment must be reversed.

It is so ordered, and the cause remanded to the superior court for further proceedings.

Crow, C. J., MORRIS, FULLERTON, and MOUNT, JJ., concur.

[No. 12036. Department One. June 24, 1914.]

ALBERT CHANDLER *et al.*, Appellants, v. THE CITY OF
SEATTLE *et al.*, Respondents.¹

MUNICIPAL CORPORATIONS—BONDS—INDEBTEDNESS—LIMITATIONS—
"LIGHT" PLANT. Bonds to be issued by a city for enlarging its municipal "lighting and power" plant and system and furnishing electricity for light, power, and heat, are to be classified as "light bonds," within the limitation of Const., art. 8, § 6, authorizing any city to become indebted to the extent of a second five per centum for supplying the city with water, "artificial light" and sewers, and not as "light and power" bonds, where from the beginning the city pursued that policy and its electric light plant was used primarily for lighting the streets and furnishing lights to the inhabitants, its hydro-electric plant could be operated twenty-four hours a day at practically the same expense as for shorter hours, the steam plant was to be auxiliary, so as to have power available for lighting in cases of emergency, and, by utilizing the surplus energy for power and heat, the cost for lights was materially reduced.

SAME—GRANT OF POWER—AUTHORITY OF CITY. A grant of power to provide for lighting a city authorizes the erection and maintenance of a plant for lighting the streets, and also, in connection therewith, supplying electric light to the inhabitants of the city in their private homes.

SAME—BONDS—UNRELATED OBJECTS. In such case, the auxiliary steam power plant and the enlargement of the hydro-electric plant did not combine unrelated objects.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 23, 1914, dismissing an action to enjoin the issuance of bonds, tried to the court. Affirmed.

Van Nuys & Hunter, for appellants.

James E. Bradford and *Howard A. Hanson*, for respondents.

GOSE, J.—This is a bill in equity by taxpayers to enjoin the issuance and sale of certain bonds. There was a judg-

¹Reported in 141 Pac. 331.

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ment for the defendants, which the plaintiffs have brought here for review.

The facts are these: In November, 1910, the citizens of Seattle, by more than a three-fifths vote, authorized the city to issue \$1,400,000 of general bonds for improving and extending the existing municipal lighting plant, by the construction of a masonry dam on Cedar river, to replace the wooden dam theretofore constructed. One million dollars of these bonds have been issued and sold. In March, 1913, the citizens by a like vote authorized the city to issue \$425,000 additional general bonds, "for enlarging and extending the municipal lighting and power plant and system . . . by the acquisition, by purchase or condemnation, of lands for a site, the construction of buildings thereon . . . for a steam power plant, for furnishing electricity for lighting, heating, fuel and power purposes, and for furnishing steam for heating purposes." The validity of the remaining \$400,000 bonds authorized at the first election and the \$425,000 authorized at the last election, is attacked by the appellants. They contend, (1) that these bonds fall within, and are in excess of, the first five per cent debt limit as fixed by § 6, art. 8, of the constitution; (2) that the steam plant proposition contains unrelated objects; and (3) that it is ambiguous.

The article of the constitution referred to provides:

"That any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with *water, artificial light, and sewers*, when the works supplying such water, light, and sewers shall be owned and controlled by the municipality."

The bonds were authorized in harmony with the provisions of the public utilities act, Laws 1909, page 580 (Rem. & Bal. Code, § 8005 *et seq.*; P. C. 77 § 1073).

The real question is, May the bonds be classified as light bonds? If so, they fall within the second five per cent limit of the constitution. The respondents contend, and the court

held, that they should be so classified. The appellants strenuously insist that they are, in fact and law, *light and power* bonds, and hence that they fall within the first debt limit of the constitution, and that if so classified the constitutional limit will be exceeded.

The city has from the beginning pursued the policy of charging such bonds to the second class. It has issued bonds and expended more than \$3,000,000 for generating and transmitting electric current from Cedar river falls to and through the city, primarily for lighting the streets of the city and furnishing lights to its inhabitants in their homes. It first constructed a wooden dam at the Cedar river falls, but finding that inadequate, additional bonds to the extent of \$1,400,000 were authorized for the construction of a masonry dam. In 1913, about twelve and one-half per cent of the entire revenue from the system was derived from the sale of current for power purposes, representing in quantity between one-fourth and one-fifth of the entire current. The city now lights one-third of its streets—about 879 miles, and furnishes lights to one-half of its inhabitants—about 150,000 people. The current rate for lighting has been reduced from twenty cents per kilowatt hour in 1902, to six cents per kilowatt hour at the present time. Mr. R. H. Thompson, formerly city engineer of the city, after detailing the purpose of the city from the beginning, gave the following testimony:

“Q. Now, having the statutes all cleared away and the field clear, you prepared the ordinance creating the city light and power system? A. Yes, sir. Q. You declared that for what purpose? A. It is a light and power ordinance and it was prepared simply to define what must happen when you distribute electric energy. It may be light or heat or power, but it is electric energy. Q. Was it ever contemplated that the plant should be purely a power plant? A. Never. Q. Was it ever contemplated that the city should go into the power business, purely as such, for manufacturing and other purposes. A. Only in connection with light. Q. Only in

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connection with light? A. Yes. Q. And what was the primary and dominating factor of the plant and system? A. To put a plant in the field, which by careful management would reduce the cost of light both to the city as a municipality and to the inhabitants of the city to a much less rate than was then being paid, and, if possible, to a rate equal to that charged for gas, and yet supplying a more cleanly method of illumination. Q. Now, has it been used after its construction for its primary purpose, and is it now being used for its primary purpose as a light plant? A. It is. Its whole purpose is for supplying light, but to make the price of that light the best price to the people who pay the cost of construction, the by-products are sold whether it is heat or power. Q. And there is a large amount of surplus energy to be disposed of as a by-product? A. During a great many hours a day there is. The light load runs up to its maximum at different hours of the year, but has an average of eight o'clock in the evening and it holds for three-quarters of an hour at the same point and then goes down to midnight, except household lights, it is almost nothing."

The evidence is that a hydro-electric plant may be operated twenty-four hours a day at practically the same expense as for shorter hours. All that is required in the operation of the plant is to permit the water to flow through the pipes and penstock onto the turbines. The steam plant will when constructed be auxiliary to the hydro-electric plant on Cedar river which is situated about forty miles from the city. The plan is to carry steam constantly, so as to have power available for lighting the city in cases of emergency. The city will use the surplus steam for power and heat. This surplus the witnesses term a by-product. By utilizing the surplus energy, the rate for lights is materially reduced. Whether the plant is operated for power or light, the expense will be the same, for, as the superintendent of the plant said: "It will be ready to connect with the light service of the city twenty-four hours in the day and 365 days in the year." The words "light, heat and power purposes" in the proposition first submitted, and the words "lighting, heating, fuel and power" in the last submission, are not controlling. They

must be read in connection with the main purpose stated in the submission, viz., "enlarging the municipal light plant," and in the light of the evidence. The city has shown in detail how it has expended the \$8,000,000 in creating, enlarging, and extending its lighting system. These expenditures are for such items as dam, pipe lines, generating station, transmission line, city sub-station, and city distributing system. The first bond issue for this purpose was in 1902. The plan then adopted has been consistently adhered to, and the policy of the city has been, and is, to extend the lighting system as rapidly as its funds will permit to furnish the city and its inhabitants with electric lights as cheaply as possible, and to this end it has disposed of its surplus energy for power. The testimony, however, makes it clear that the principal and dominant object of the city has been, and is, to generate and transmit electric energy for lighting purposes.

An analogy may be found in eminent domain cases. In *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, it was held that the city, in condemning land and water for the purpose of generating electric current for public uses, might anticipate future needs, and that a private use of the excess current, or of the current when not needed for public use, would not defeat the right to condemn for public uses. We there said:

"It is manifest that, in its use of power, the city must provide for the maximum power that will be required on the shortest day of the year. This required use would be its peak load, and would be the minimum horse power to be generated by its contemplated plant, or purchased under its present contracts. This peak load would gradually lessen until the longest day of the year, when it would be much less than its peak requirement; yet inasmuch as there is no known way whereby the city could store and save its power when not in use, it must provide, on the longest day of the year and at the time of least requirement, the same amount of power it must use on the shortest day of the year and at the time of greatest requirement. Neither will it require power

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for lights until the evening of the day; yet it must have as much power at high noon as on the darkest night. If, in the meantime, it permits a small mechanic to run his lathe or sharpen his tools, such a use being so insignificant and so small as compared with the necessities that must be supplied, no court would hold that such use was such a private use as to prevent the city from maintaining these proceedings. A private use incidentally included will not defeat the right to condemn for public use so long as the public use is maintained."

In that case, the incidental use was smaller than in the case at bar, but the difference is one of degree, not of principle. Where there is a commingling of two objects to the extent that both are principal objects, a different rule applies. It is a question of *bona fide* intention, to be gathered from all the facts and circumstances in the particular case. Conservation and not waste should be the guiding rule. Whether the use of current for power and heating is an incidental use is a relative question. Obviously in a small town of slow growth the ratio of power to light would be less than in a rapidly growing city, because the ratio of surplus energy would be less. The rule announced in the Tacoma case was followed in *State ex rel. Lyle Light, Power & Water Co. v. Superior Court*, 70 Wash. 486, 127 Pac. 104; and *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591.

The same view has been taken by textwriters and courts in other jurisdictions. Dillon, *Municipal Corporations* (5th ed.), § 1300; *Pikes Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1; *Crouch v. City of McKinney*, 47 Tex. Civ. App. 54; *People ex rel. Los Angeles v. Los Angeles Independent Gas Co.*, 150 Cal. 557, 89 Pac. 108; *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 166. In the *Crouch* case, the city was operating under a statute which gave it power to provide for lighting the streets. In considering the right of the city to use the surplus power of the plant for private uses, the court said:

"The capacity of the electric plant is much greater than necessary for the lighting of the streets and the excess or surplus is used by the city in supplying lights to individuals for their private use. When the city has a surplus of power after discharging its duty to the public, there seems to be no question of its authority to sell the excess to private citizens. . . . Under these conditions, rather than to have let the surplus power of the plant remain idle, it was better to sell such surplus of the electricity that was produced, for private use."

In *Bates v. Bassett*, the rule is thus declared:

"The town has no right as a primary purpose to erect buildings to rent, but if in erection of its hall for its proper municipal uses, it conceives that it will lighten its burdens to rent part of its building whereby an income is gained, no sound reason is suggested why it may not do so. The true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose the expenditure is legal, notwithstanding it also involves as an incident an expense which standing alone would not be lawful. But if the primary object is not to subserve a public municipal purpose but to promote some private end, the expenditure is illegal, even though it may incidentally serve some public purpose. This is the test where good faith is exercised in making the expenditures. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent."

A grant of power to provide for lighting the city authorizes the erection and maintenance of an electric plant for lighting the streets, and also supplying, in connection therewith, electric light for the inhabitants of the city in their private homes. *Jacksonville Elec. Light Co. v. Jacksonville*, 36 Fla. 229, 18 South. 677, 51 Am. St. 24, 30 L. R. A. 540. It has also been held, and we think correctly, that furnishing current for lights for the people in their private homes is a public service. *Mitchell v. City of Negaunee*, 113 Mich. 359, 71 N. W. 646, 67 Am. St. 468, 38 L. R. A. 157.

The appellants next contend that the steam power plant proposition combines several unrelated objects. We have al-

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ready sufficiently analyzed this question. It suffices to say in addition that the evidence shows a purpose to have one efficient lighting system ready at all times to serve the public. *Blaine v. Hamilton*, 64 Wash. 353, 116 Pac. 1076, 35 L. R. A. (N. S.) 577; *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481.

Finally, it is contended that the steam plant proposition is ambiguous in that it does not disclose whether the plant is to be physically connected with, or independent of, the existing light plant. It shows on its face that it is to be an extension of the existing plant.

The judgment is affirmed.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11504 *En Banc*. June 25, 1914.]

D. D. DAY *et al.*, Appellants, v. TACOMA RAILWAY & POWER
COMPANY *et al.*, Respondents.¹

CARRIERS—PUBLIC DUTIES—ABANDONMENT—AUTHORITY FOR—POWER OF COUNTY COMMISSIONERS. Rem. & Bal. Code, § 9080, empowering county commissioners to grant franchises for railway systems upon public roads outside the limits of incorporated cities and towns and to prescribe the terms and conditions on which they may be enjoyed, does not expressly or by implication confer power upon the commissioners to consent to an abandonment of any public duty imposed upon or assumed by common carriers.

CARRIERS—PUBLIC DUTIES—ABANDONMENT OF LINE. A common carrier having exercised the privileges conferred under a permissive franchise, neither it nor its successor in interest, can, against the will of the state, abandon the enterprise if it works a prejudice to the public interest.

SAME—ACTION TO ENJOIN ABANDONMENT OF LINE—PARTIES ENTITLED—PRIVATE INTERESTS—COMPLAINT—SUFFICIENCY. Individuals, living along the line of a street railway, cannot maintain an action to prevent the company from abandoning the route merely because they, "and many other residents similarly situated," are dependent on the line for railway service, in the absence of any allegation as

¹Reported in 141 Pac. 347.

to the number of persons affected who are too remote to use a new parallel route, or the manner in which the public convenience will be affected.

SAME — ABANDONMENT OF LINE — PUBLIC INTEREST — COMPETITIVE SERVICE. Injunction does not lie to prevent a street railway company from abandoning that part of its road lying between two stations served by a competing road lying closely parallel, merely because the abandonment necessarily results in depriving all persons to whom both roads are accessible of competitive service; since the whole theory of the public service law (3 Rem. & Bal. Code, § 8626-1 *et seq.*), is opposed to the idea that the public will be better served with two closely parallel lines of road where one road will amply suffice.

RAILROADS—OWNERSHIP OF STOCK IN COMPETING LINE—WHO MAY QUESTION. A private citizen cannot raise the question whether a railroad corporation in owning all the stock of other companies violated Const., art. 12, § 16, prohibiting the consolidation of its stock, property or franchises with any other railroad owning a competing line, or Rem. & Bal. Code, § 8665, further prohibiting the owning of a competing line or any stock or interest in a company owning or operating a competing line; since the question should be left open for the state for such action as it deems wise.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered August 9, 1913, dismissing an action for equitable relief, upon sustaining demurrers to the complaint. Affirmed.

B. S. Grosscup and *W. C. Morrow*, for appellants.

John A. Shackleford, for respondents.

Gose, J.—This case is before us upon an appeal from a judgment entered after demurrers to the complaint had been sustained, upon the plaintiffs declining to plead further. The complaint is too lengthy to be set forth in full. In substance, it alleges, that the respondents Tacoma Railway & Power Company, Puget Sound Electric Company, and Pacific Traction Company, are foreign corporations, and that they have severally qualified themselves to do business in this state; that, in the year 1888, the city of Tacoma granted to one Thompson and his associates "the right, power and author-

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ity" to construct, maintain, and operate a line of electric railway, beginning at "K" street, thence running westerly to what is now known as Proctor street, thence westerly to the city limits; that, on the 2d day of May, 1890, Thompson and T. O. Abbott incorporated the Tacoma & Steilacoom Railway Company, under the laws of this state; that its articles recite that the objects for which the corporation is formed are "to build, equip, and operate," a narrow or standard gauge railway, according to the route described in the franchise granted to Thompson and his associates, thence following a fixed course to and through Steilacoom city; that it acquired the rights granted in the Thompson franchise, and acquired, by purchase and gift, the right of way for an electric line between Tacoma and Steilacoom, constructed the line in the years 1890 and 1891, and put the same in operation as an electric railway doing a general freight and passenger business between the town of Steilacoom and the initial point in the city of Tacoma; that the line has ever since been "maintained and operated;" that, in 1899, "said line" was acquired by the respondent Tacoma Railway & Power Company as a part of its general system of railways in the city of Tacoma and suburbs thereof; that certain rights of way outside of the city limits were donated by the owners in consideration of the building and operation of the road.

It also alleges that, in 1905, the Pacific Traction Company constructed a line of railway from South Seventh street, in the city of Tacoma, through intervening streets to Proctor street, and thence to the north side of American Lake, and about the year 1907 constructed a branch line from a point near the south city limits of the city of Tacoma to the state hospital for the insane, "a short distance from the line constructed by the Tacoma & Steilacoom Railway Company;" that, the Pacific Traction Company was proposing, at said time, to continue its line to the town of Steilacoom; that the branch line from the town of Steilacoom to the city of Ta-

coma is a competing line with the line constructed by the Tacoma & Steilacoom company; that, in December, 1912, the power company applied to, and secured from, the county commissioners of Pierce county, a franchise to extend the line of the Traction company from the state hospital for the insane about a mile and a half northerly to the town of Steilacoom, which franchise was granted by the commissioners, "upon condition that the Tacoma Railway & Power Company would abandon its Steilacoom line between Lemon's Beach Station and Chambers Creek, and grant all its rights in and to said right of way to said county for highway purposes," which franchise and conditions the Power company has accepted, and that it is now threatening to tear up its line between such points; that the appellants all own land adjacent to the line between Lemon's Beach and Chambers Creek, and are dependent upon said line for railway service "both to the village of Steilacoom and to the city of Tacoma, and that there are" many other residents similarly situated; that all persons who are situated so that they can use the lines of both companies will be deprived of competitive service; that the abandoning of the line will greatly and irreparably depreciate the value of the property of all the respondents, and render the same practically useless for residence purposes, and that the appellants would not have purchased their land, and those who reside thereon would not have constructed their residences, had it not been for the operation of the adjacent railway.

It is further alleged that, in the year 1910, the Puget Sound Electric Railway, having theretofore acquired all the stock of the Tacoma Railway & Power Company, acquired the stock of the Pacific Traction Company, and that it has since, in virtue of its ownership of stock, in various and sundry ways, sought to effect a consolidation of the two competing lines; that the tearing up of the line between Lemon's Beach and Chambers Creek will consummate a consolidation of the two competing lines; that the Puget Sound Electric

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Railway has caused certain portions of the line of the Pacific Traction Company in the city of Tacoma "to be torn up and destroyed;" that the Tacoma Railway & Power Company enjoys valuable franchises between "K" street, in the city of Tacoma, and Lemon's Beach Station and between Chambers Creek and the town of Steilacoom, all of which were acquired as a part of one continuous line which it purposes to retain.

It is further alleged that the public service commission of the state has not authorized the abandonment of the Steilacoom line or any portion thereof, and that it has at no time approved or authorized any of the acts which the appellants seek to enjoin. The prayer is, (a) that the Tacoma Railway & Power Company and the Pacific Traction Company be enjoined from further perfecting the consolidation of the competing lines; (b) that the Tacoma Railway & Power Company be enjoined from tearing up its tracks and discontinuing the operation of its line of railway between the city of Tacoma and the town of Steilacoom, and that it be enjoined from ceasing to operate such line.

The respondents severally demurred to the complaint upon all the statutory grounds, but the record does not advise us as to the ground upon which they were sustained. We assume, however, that the court was of the opinion that the complaint does not state facts sufficient to constitute a cause of action.

The question presented is, Does the complaint charge a violation of a public duty which the appellants, as private litigants owning property adjacent to the part of the road proposed to be discontinued, may enjoin? In *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515, it was held that the defendant, having acquired the street railway line, could be required to resume operation of a part of the line known as Minnehaha Park line, which it had operated for a time and then ceased such operation. There were about forty families, including the relator, living adjacent to the discontinued line,

who availed themselves of the facilities for travel which it afforded. It carried eighty to one hundred and twenty people daily. It was also held that the relator was a proper party to enforce a duty "due to the public." The court said that the defendant, having undertaken to operate the line, owed an implied duty to the public to continue the operation, a duty which it could not abandon without the consent of the granting power, meaning the state or its proper representative acting in pursuance of law.

The board of county commissioners had no legal authority to consent to an abandonment of any public duty imposed upon or assumed by the respondents as common carriers. The code, Rem. & Bal. Code, § 9080 (P. C. 405 § 327), does not, either expressly or by reasonable implication, confer such power upon county commissioners. It merely empowers them to grant authority for the construction, maintenance, and operation of such railway systems upon public roads outside of the limits of incorporated cities and towns, and to prescribe "the terms and conditions" on which these privileges may be enjoyed. In *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369, cited by the respondents in support of the action of the commissioners, the city charter empowered the city council "to provide for the alteration, change of grade or removal" of any railroad in any street of the city. It was held that this language vested in the city council the power to represent the public interest in respect to railways within the city.

Under the rule announced in the *Grinsfelder* case, neither the grantee nor its successor in interest, having exercised the privileges conferred under a permissive franchise, can, against the will of the state, abandon the enterprise if the abandonment works a prejudice to the public interest. This rule has abundant support in other jurisdictions: *Gates v. Boston & New York A. L. R. Co.*, 53 Conn. 333, 5 Atl. 695; *State v. Hartford & New Haven R. Co.*, 29 Conn. 538; *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44

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South. 213, 13 L. R. A. (N. S.) 320. And this duty survives a transfer of the property to other companies. *Bridgeton v. Bridgeton & M. Traction Co.*, 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; *Fellows v. City of Los Angeles*, 151 Cal. 52, 90 Pac. 137; *City of Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. 312; *Kansas City Interurban R. Co. v. Davis*, 197 Mo. 669, 95 S. W. 881; *State v. Sioux City & Pac. R. Co.*, 7 Neb. 357; *Brooklyn & R. B. R. Co. v. Long Island R. Co.*, 72 App. Div. 496, 76 N. Y. Supp. 777. The rule has its basis in the principle that the sovereign powers are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. *Gates v. Boston & N. Y. A. L. R. Co.*, *supra*.

The theory of the complaint seems to be that the road cannot be abandoned, (1) because the appellants and "many other residents" similarly situated are dependent upon the line for railway services; (2) because all persons so situated that they can use the line of both companies will be deprived of competitive service; and (3) because the Puget Sound Electric Railway is using its co-respondents as instruments to accomplish an unlawful consolidation.

The first proposition is, we think, without merit. Public service companies, as the name implies, are created to perform a public function. As we said in *State ex rel. Whitehouse v. Northern Pac. R. Co.*, 53 Wash. 370, 102 Pac. 24, roads may be straightened, and curves and grades may be reduced, and changes made to meet the demands of commerce and competition. What we conceive to be the correct rule is aptly stated in *Asher v. Hutchinson Water, Light & Power Co.*, 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52, where the court said:

"An individual can acquire no vested right, as against the public, in the continued service of a public utility. Such a doctrine once admitted would destroy the convenience as a public utility; it would then become hampered and subject to the control of the individual and made to subserve such interests, to the detriment of the public welfare."

In *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390, 129 Am. St. 423, 17 L. R. A. (N. S.) 190, it was held that, where the public interest as well as the pecuniary advantage of the railway company is promoted by shortening and straightening the line of road, a private individual cannot require the company to maintain a train service over the abandoned road, although it had contracted with his predecessor in title to construct and maintain a turn-out and siding upon his premises, and to take on and let off persons going to and from his farm, and to leave at the siding for unloading any car containing a fixed amount of freight. The reason for the holding is thus stated:

"We think there is a manifest distinction to be made between covenants to establish and maintain stations for the public convenience, and those to establish and maintain sidings, turn-outs, crossings and the like, for private use merely."

In *Northern Pac. R. Co. v. Washington Territory ex rel. Dustin*, 142 U. S. 492, the court refused to require the railroad company to erect and maintain a station at Yakima City, and to stop its trains there to receive and deliver freight and to receive and let off passengers. The decision was put upon the ground that, "The court will never order a railroad station to be built or maintained contrary to the public interest."

The complaint is silent as to the approximate number of people patronizing the Steilacoom line who are too remote from the other line to avail themselves of its service. Nor does it advise us as to the extent that they patronize the Steilacoom line. The fact that the appellants and "many other residents . . . similarly situated" patronize it at all is left to inference. Those facts were shown in the *Grinsfelder* case. It does appear, however, that the lines lie closely parallel. This being true, the complaint as an entirety, negatives the view that the appellants are dependent upon the

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Steilacoom line for service. It only affords them a more convenient service.

The more difficult question is, Can the respondents be enjoined from abandoning that part of the road between the stations named, when such abandonment will necessarily result in depriving all persons to whom both roads are accessible of competitive service, there having been no legal consent to such abandonment? The real question is, Will such abandonment be a violation of a public duty which ought to be enjoined? The allegation is that the roads are near each other. It is not alleged that one road is inadequate to handle the business. If it were necessary, it might be judicially noticed that one road is ample to serve all the needs of the public between the town of Steilacoom and the city of Tacoma. The public will still be adequately served after the abandonment. Under the public service commission law, Laws 1911, p. 538 (3 Rem. & Bal. Code, § 8626-1 *et seq.*), all charges for transportation of persons or property shall be "just, fair, reasonable, and sufficient," and every common carrier must render adequate and sufficient service and facilities to enable it to promptly and expeditiously take care of the public business without discrimination. The whole theory of the public service commission law is opposed to the idea that the public will be better served with two lines of road lying closely parallel, situated as these roads are situated, where one road will amply suffice. The purpose of this law is to require adequate and safe service at a reasonable price and without discrimination. When the public is afforded such a service, its needs are satisfied and no citizen can justly complain. *Sherwood v. Atlanta & D. R. Co.*, 94 Va. 291, 26 S. E. 943. There mandamus was denied where it was sought to require the company to resume operation of that part of its line which it was not required by its charter to construct or operate, but which it had operated for a time. It was held that, in respect to assumed duties, the court will consider all the circumstances of the case, and grant or deny the relief according

as the duties demanded may or may not promote the public interest. *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369, holds that, where a railroad company owns two lines of road and can substantially accommodate the people of the state by operating one line between the same points, and can abandon the other line without any serious detriment "to any considerable number of people," it cannot be required by mandamus to operate both lines at a great sacrifice.

Finally, it is contended that the complaint shows an attempt to bring about a consolidation of two competing roads, in violation of art. 12, § 16, of the constitution, and Laws 1909, p. 698, § 1. The former provides: "No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line." The latter provides:

"That no railroad or transportation corporation shall consolidate its stock, property, or franchises with any other railroad or transportation corporation owning a competing line, or purchase either directly or indirectly, any stock or interest in a railroad or transportation corporation owning or operating a competing line." Rem. & Bal. Code, § 8665 (P. C. 433 § 17).

There is no allegation either that the Puget Sound Electric Railway has consolidated its stock, property or franchises with either of the other respondent companies, or that it owns a competing line. The allegation is that it owns all the stock of the other companies, they being competing lines. If it has violated either the constitutional provision or the statute, we think that question cannot be raised by private litigants, but should be left open to the state for such action as it deems wise.

Affirmed.

CROW, C. J., MOUNT, MAIN, PARKER, MORRIS, FULLERTON, and ELLIS, JJ., concur.

CHADWICK, J.—(concurring)—Under our present laws, no citizen has a right to insist that two public utilities be

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maintained in order to preserve competition. Competition between those engaged in public service is a condition which may have been real; but, in the light of modern industrial development and a more enlightened understanding of such problems, it has become an item of lesser consequence, if indeed, it may be considered at all. The legislature of this state, in the exercise of its legislative functions, has written the law upon a different theory, a theory foreseen by the framers of the constitution. Art. 12, § 1.

The people long since abandoned the hope of relief from unjust rates and inadequate service from competing lines or interests. The history of public service corporations is such that it can be asserted as a fact that reliance upon competition has been a vain hope and, in the greater number of cases, perhaps in all cases, it has been defeated by secret compacts and understandings. The people, therefore, determined to regulate and control, to fix rates and prescribe schedules, to the end that the public shall have an adequate service at a fair cost.

The use by the legislature of the two words "reasonable" and "sufficient," establish this point. That body plainly intended that companies covering the same field should not hereafter be permitted to resort to the old methods of cutting rates and by this means drive the weaker competitor out of the field to the end that the survivor might exploit the public at will. Indeed, two companies furnishing the same service is, under our law, an imposition upon the taxpayer, unwarranted and unjustifiable. It is only necessary to refer to the dual system of telephones that have been maintained in some of the cities of this state to prove this premise. Instead of cheaper and better service, the system has resulted in a double burden of expense, and oftentimes in utter confusion of service. The statute implies that it is better to have one service controlled in all its workings by the agents of the state. Under our public utilities law, we have all the advantages, with none of the disadvantages, of public owner-

ship; and the commissioners of Pierce county would have failed to do their whole duty had they acted otherwise than they did in the case at bar.

Inasmuch as the supposed right to insist upon the pretense of competition is the only plausible ground urged by appellants, it follows that the decree of the lower court should be affirmed.

[No. 11514. Department One. June 25, 1914.]

L. M. LANE, *Respondent*, v. H. C. HENRY, *Appellant*.¹

CONTRACTS—VALIDITY—EFFECT OF VIOLATION OF STATUTE—PLEDGES. A contract of pledge, providing for a violation of Rem. & Bal. Code, §§ 2481-2483, providing that pawnbrokers shall keep a record of each loan and report the same to the police, does not render the contract void; since the statute was a regulation of business and did not provide that a contract violating its provisions should be void.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 22, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action of replevin. Affirmed.

G. E. de Steiguer, for appellant

F. J. Carver and John Slattery, for respondent.

MAIN, J.—The purpose of this action, as stated in the complaint, was to recover specific personal property, and in the alternative damages.

The facts, so far as necessary to here set them forth, are in substance as follows: On or about the 6th day of September, 1911, the respondent, being then the owner of a diamond ring, sought to pledge the same to one Oscar E. Jensen for a loan. Jensen not being able to make the loan himself, stated to the respondent that he would secure the money for him. Thereupon the ring was taken by Jensen and application made to one Travis, manager of the Provident Pledge

¹Reported in 141 Pac. 365.

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Opinion: Per MAIN, J.

Society, and the ring was pledged as security for a loan in the sum of \$150. Jensen testified that he arranged with Travis that neither his nor Lane's name should appear in the transaction, but that the pledge should be carried on the books under the name of Ole E. Johnson, a fictitious person, and should not be reported to the chief of police as required by law. The respondent had no part in the arrangement between Travis and Jensen; but when the money obtained upon the diamond was turned over by Jensen to the respondent, there accompanied it a slip showing that the pledge was in the name of Ole E. Johnson. The appellant was the owner of the Provident Pledge Society, but there is no evidence that he had any knowledge whatever of the transaction. The loan not being paid when due, the diamond was subsequently sold. Jensen claims that this was in violation of an agreement for an extension of time made with Travis. This is denied by Travis.

The disputed questions of fact, as well as the value of the ring, were submitted to the jury. A verdict was returned in favor of the plaintiff. Motions for judgment notwithstanding the verdict, and in the alternative for a new trial, were interposed by the defendant and overruled by the court. Judgment was entered in favor of the respondent in the sum of \$344. The defendant appeals.

The principal contention of the appellant is that the contract is void because of the agreement entered into between Jensen and Travis at the time the pledge was made that the transaction should not be recorded and reported to the chief of police as required by the Laws of 1909, p. 959, §§ 229-231 (Rem. & Bal. Code, §§ 2481-2483). By this statute, it is made the duty of every pawnbroker and second-hand dealer to maintain in his place of business a book or other permanent record in which shall be recorded each loan, purchase, or sale, and the name and address of the persons with whom the transaction is had, together with other data. For failure to obey the mandate of the statute, a penalty is imposed. By

the terms of the act, however, it does not appear that the contract should be void if the pawnbroker fail to perform the statutory duty. The purpose of this statute was to regulate the business of pawnbrokers and second-hand dealers. Assuming that the acts of Jensen in agreeing with Travis that the law should not be complied with were chargeable to the respondent, does it follow that the contract was void? The rule is, that where a contract violates a statutory regulation of business, it does not thereby become void unless made so by the terms of the act. Sutherland, *Statutory Construction*, § 386; *Hughes v. Snell*, 28 Okl. 828, 115 Pac. 1105, Ann. Cas. 1912 D. 374, 34 L. R. A. (N. S.) 1133; *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595; *Ferguson-Hendrix Co. v. Fidelity & Deposit Co.*, 79 Wash. 528, 140 Pac. 700. In the *Way* case, it was said, speaking upon this question:

"Plaintiff's error lies in the assumption that the contract between the copartnership and the defendant was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act."

Error is also sought to be predicated upon certain instructions to the jury and the refusal of the trial court to give requested instructions. But we find no prejudicial error in this regard. The instructions given stated the law of the case, and this is all that is required.

The judgment will be affirmed.

CROW, C. J., ELLIS, CHADWICK, and GOSE, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 11758. Department Two. June 25, 1914.]

Alice C. Doyle, *Appellant*, v. W. E. Langdon,
Respondent.¹

EXECUTORS AND ADMINISTRATORS — DISTRIBUTION — VACATION — FRAUD—EVIDENCE—SUFFICIENCY. Fraud on the part of an administrator in securing final distribution of the whole estate to himself, as widower of the deceased, on the theory that the property was their community property, to the exclusion of the mother of the deceased, who claimed an interest in that the property was deceased's separate estate, is not shown by clear and satisfactory evidence, from the fact that the administrator at first wrote a letter stating that the property would be distributed to them both as sole heirs, where the letter stated that the property was community property, and shortly after, long before distribution, both by letter and personally, he explained that he had been mistaken as to the rule of descent of community property, and claimed to be the sole heir, and such claim was unquestioned until after final distribution.

HUSBAND AND WIFE—COMMUNITY PROPERTY — COMMINGLED FUNDS. There was such a commingling of separate and community funds that the court cannot say that any part of the property acquired was the separate property of the wife, where, ten years before the wife's death, certain proceeds of her separate real estate was deposited in a bank, and the husband from time to time, contributed from his earnings to the fund, from which was paid all their household expenses, as well as sums paid in the acquisition of property possessed by them at the time of the wife's death.

APPEAL—HARMLESS ERROR—EVIDENCE. The erroneous admission of evidence is harmless where the result of the cause would be unchanged were the evidence excluded.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 4, 1913, dismissing an action for equitable relief, after a trial on the merits to the court. Affirmed.

Sherwood & Mansfield, for appellant.

Walter S. Fulton, for respondent.

FULLERTON, J.—On November 29, 1909, Katherine F. Langdon died intestate, in King county, Washington, leav-

Reported in 141 Pac. 352.

ing an estate, situated in part in King county and in part in Snohomish county, consisting of real and personal property. Letters of administration on her estate were issued to W. E. Langdon, as her surviving husband, on December 13, 1909. On the same day, the administrator filed the statutory affidavit of heirs, averring therein that he, as the surviving husband of the deceased, whose place of residence was at Seattle, Washington, and the appellant Alice C. Doyle, as her mother, whose place of residence was at Chicago, Illinois, were the sole heirs of the deceased's estate. Due notice to creditors was given, and the administration of the estate was proceeded with regularly otherwise, until February 27, 1911, at which time the administrator filed his final account with the estate, together with a petition for distribution. In this petition, the administrator averred that the property of the estate was the community property of himself and his deceased wife, and that he was the sole heir and distributee thereof. April 3, 1911, was fixed by the court for settling the final account and for a hearing on the petition, of which time the statutory notice was regularly given. No appearance was made on the day appointed for the hearing by any one claiming to be interested in the estate, and on that day the court entered a decree approving the final account and awarding the property to the administrator as the surviving husband of the deceased, reciting in the decree that the property of the estate was community property.

The present action was begun by Alice C. Doyle, on August 17, 1912, to set aside the decree of distribution and for an award to her of an undivided half interest in the property. In her complaint, she alleged that the property of the estate was the separate property of Katherine F. Langdon; that she was the mother of the deceased, and a co-heir to her estate with the administrator, W. E. Langdon, and that she had been deprived of her interest therein by the fraud and deceit of the administrator. The administrator answered the allegations of the complaint by a general denial; and on the

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issues thus framed, a trial was had before the court, as a cause of equitable cognizance. No formal findings of fact or conclusions of law were made by the court, but the learned trial judge, at the close of the case, made an orderly and succinct statement of the evidence and of the conclusions he drew therefrom, finding that no fraud had been practiced upon the plaintiff by the administrator, and that the property was, in fact, the community property of the deceased and her husband, and not the separate property of the deceased, entering a judgment accordingly. From the judgment entered, this appeal is prosecuted.

The claim of fraud and deceit is based upon the conduct of the administrator had in connection with the probate proceedings. From the statement of the facts relating to the administration proceedings, it will be observed that the proceedings were apparently instituted originally on the theory that the property of the estate was the separate property of the decedent, in which case it would descend in equal shares to the respondent and appellant, and that the administrator subsequently adopted the theory that the property was community property, which would change the rule of descent, the respondent in that case being the sole heir thereof. In connection with this, the appellant testified (her testimony being taken by deposition) that, shortly after the institution of the probate proceedings, the respondent wrote a letter to a member of her family at Chicago in which he stated the fact of his wife's death, the fact that she left an estate, that he had begun administration proceedings upon the estate and would attend to its due administration, and that the appellant with himself were the heirs at law of the estate and the persons to whom it would be finally distributed. She testified further that she relied upon these statements, believing that the respondent would carry into effect his promises, and had no knowledge or idea prior to the entering of the decree of distribution that the estate would not be so distributed; that she was thereby lulled into security, and, for

that reason, did not appear in the proceedings or take any steps otherwise for the protection of her interests.

But, however persuasive these facts may be, when considered by themselves, they lose much, if not all, of their effectiveness when considered with other facts in the record. The testimony on the part of the respondent tended to show that he did not so much change his opinion as to the character of the property of the estate—that is, whether it was separate or community property—as he did his views of the law with relation to the descent of community property. He testified that he at all times understood and claimed that the property was community property, but understood from his attorney that the rule of descent as to property of that character did not differ from the rule applicable to separate property. The letter on which the appellant relies bears out this statement. In it, he describes the property left by the decedent with particularity, and speaks of it as property “we owned,” as “our property,” and as “community property;” saying therein, “Mother Doyle and I are the sole heirs of Katherine’s community interest” in such property. This letter was written on the day after letters of administration were granted to him, before he made claim to be the sole heir of the estate, and before he learned that the rule of descent was different with respect to community property than it was with reference to separate property. Clearly, if he thought then that the property was the separate property of his wife, he would not have used the terms in describing it that he used in the letter. Moreover, it was shown that he discovered his mistake about a month later, and immediately wrote another letter to a member of the appellant’s family at Chicago, in which he enclosed copies of the statutes of this state showing the rule of descent with reference to community property, and saying that he had been in error in regard thereto in his former letter. That this letter, at some time, reached the appellant is made clear by her deposition, as she attaches the same thereto. That she

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received it long prior to the close of the administration of the estate, we think is also clear. Aside from the fact that it is improbable that a member of her family would not immediately show her a letter which so vitally affected her interests, the respondent testifies that he visited the appellant and the different members of her family at Chicago, not long after writing it, and that on this visit the matter of the heirship of the estate was fully talked over with the appellant, in the presence of different members of the family, including the persons to whom the letters were written. Some fault is found because the letters were not written directly to the appellant, and because the second letter was not written to the same member of the family to whom the first one was written. But the fact that the appellant was not addressed directly is explained by her rather extreme age and her inability to either read or write. As to the other part of the objection, it seems that neither of the persons addressed resided in the immediate family of the appellant, and it is difficult to see why one might not as well be addressed as another. But the fact is immaterial, since we conclude that knowledge of the contents of the letter, and knowledge of the respondent's intended action with regard to the estate, were brought home to the appellant prior to the time the administration thereof was closed.

Since fraud must be proved by clear and convincing evidence, we are unable to conclude, on the foregoing facts, that the trial court did not rightly decide that fraud had not been proven. We have not overlooked the appellant's strictures upon the conduct and character of the respondent, based upon his past history, but, giving these their full weight, we agree with the trial judge that it is difficult to conceive anything the respondent could have done that he did not do towards informing the appellant and her immediate relations of his intentions with regard to the property.

But, moreover, we cannot follow the appellant in her claim that the property of this estate was the separate property

of the decedent. The evidence regarding this branch of the case can hardly be even epitomized here, but it has its foundation in the claim that the property left by the decedent was the result of investments made by her of moneys she had prior to her marriage with the respondent. The parties were married on May 23, 1899, some ten years prior to the wife's death. The appellant testifies that her daughter had at that time money and personal property of the value of more than \$10,000, and real property in the city of Chicago of the value of about \$8,000, which was sold shortly after her marriage. The respondent, however, testifies that his wife had no money at the time of the marriage, and that the sale of the Chicago real estate, mentioned by the appellant, netted, after the commissions on the sale and the amount of a mortgage thereon had been deducted, a little less than two thousand dollars. He further testified that this money was deposited in a bank with moneys of his own; that he contributed to such fund from time to time as money was earned by him; and that, from this fund, was paid all of their household expenses, as well as the sums which were paid in the acquisition of the property possessed by them at the time of his wife's death. None of the wife's separate funds was traced directly into any particular piece of property, and we conclude, with the trial court, that there was such a commingling of community and separate funds as will not enable the court at this time to say that any part of the property acquired was the separate property of the wife.

The appellant further complains that the court erred in the admission of certain evidence. But, aside from the fact that we think the evidence properly admitted, we are unable to conclude that the result of the cause would be changed were the evidence excluded. If error at all, it was error without prejudice, and therefore immaterial.

The judgment is affirmed.

CROW, C. J., MORRIS, PARKER, and MOUNT, JJ., concur.

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Statement of Case.

[No. 11788. Department One. June 25, 1914.]

R. M. ARMOUR, *Respondent*, v. FREDERICK L. SEIXAS *et al.*,
Appellants.¹

APPEAL—REVIEW—QUESTIONS NOT PRESENTED BELOW—PLEADINGS. In an action of replevin, it is immaterial that the complaint failed to allege that the *res* was in the county where the action was brought, where it appeared that all the parties resided, and inferentially that all the transactions took place, in that county, and one of the defendants admitted possession, and there was no evidence that the *res* was not at all times in the county.

REPLEVIN—DEMAND—NECESSITY—PLEADING AND PROOF. A non-suit in replevin should not be granted for failure to allege a demand, where the demand was proved; nor for failure to prove a demand upon a defendant claiming the right of possession as owner.

GARNISHMENT—PENDING SUIT—EFFECT—STAY OF JUDGMENT OR EXECUTION. Where, after findings for plaintiff in replevin, and pending defendant's motion for a new trial, the defendant was garnisheed as a debtor of the plaintiff, or as having property in its possession belonging to plaintiff, the defendant should be allowed to show such fact, which, if found to be true, entitled defendant to a stay of judgment or execution to the end that it might protect itself from a double liability for the same debt, until the garnishment was disposed of.

REPLEVIN—VALUE OF PROPERTY. A finding of the value of the property is essential to sustain a judgment of replevin.

REPLEVIN—VALUE OF PROPERTY—EVIDENCE. In replevin, an admission of the value of the property, an automobile, several months before it was taken, is not evidence of the value at the time of the taking.

SAME—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY. In replevin, a finding of the value of the property is not supported by the uncontroverted affidavit for the writ alleging the value of the property at the time of the taking, where neither the affidavit nor the writ was served on the defendants, and the same value alleged in the complaint was denied in the answer.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 3, 1913, upon find-

ings in favor of the plaintiff, in an action of replevin, tried on the merits to the court. Modified.

Byers & Byers, for appellants.

H. D. Allison, for respondent.

ELLIS, J.—This is an action of claim and delivery, to recover the possession of an automobile. It was originally commenced against the defendant Seixas alone. He answered, alleging that, prior to the commencement of the action, he had delivered the property to the Elliott Bay Investment Company. On his demand, the court ordered that that company be made a party defendant. The Elliott Bay Investment Company answered, admitting possession, and claiming ownership. The plaintiff replied to these answers. The cause was tried to the court without a jury.

The court found, in substance, that, about May 29, 1911, the Elliott Bay Investment Company, a domestic corporation, sold to the plaintiff, the defendant Seixas and one Thorne, a certain automobile, for \$1,000; that the automobile was delivered to the partners, and was rightfully in their possession; that subsequently, Thorne and the defendant Seixas transferred to the plaintiff all their right and interest in the automobile, and delivered to him the possession thereof, which transaction was evidenced by a written agreement executed about August 21, 1911; that, on or about the 15th day of December, 1911, the defendant Seixas wrongfully, and without due process of law, took the automobile into his possession and from the possession of the plaintiff, and has, ever since, refused to deliver it to the plaintiff; that, at some date subsequent to the taking of the automobile, Seixas wrongfully delivered the possession thereof to the defendant Elliott Bay Investment Company, which now has possession thereof; that, prior to the commencement of this action, the plaintiff made demand upon the defendant Seixas for a return of the automobile, which was refused; that, at the time the defendant Elliott Bay Investment Com-

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pany was made a party to this suit, demand was also made upon that company for the delivery of the automobile, which was refused; that, at all times since August 21, 1911, plaintiff was, and now is, the owner of the automobile and is entitled to the possession thereof; that the value of the automobile is the sum of \$1,000. These findings, save the last, were supported by the evidence. They were made on March 3, 1913. Upon appropriate conclusions of law, the court, on the same day, entered judgment against both defendants for the delivery of the automobile to the plaintiff within twenty days from the entry of judgment, or, in case of appeal and *supersedeas*, within seven days from the return of the *remititur*, and, in the event that the automobile cannot be delivered to the plaintiff, he have and recover judgment against the defendants and each of them for the sum of \$1,000 and his costs, and that execution issue therefor. Both defendants appealed.

I. The appellants first claim that the judgment should be reversed for the reason that the complaint failed to allege, and the evidence to show, that the automobile was in King county when the suit was brought. We find it unnecessary to decide whether, in a suit of this character, it is necessary to allege the presence of the *res* in the county where the action is brought. It was alleged that all of the parties resided in King county and, inferentially, that all of the transactions found by the court took place in that county. In its answer, the appellant Elliott Bay Investment Company admitted its possession of the automobile, and claimed the right to possession as owner. The pleadings did not show, nor did it develop in evidence, that the automobile was ^{not} at all the times mentioned within King county. Under the rule announced in *Andrews v. Hoeslich*, 47 Wash. 220, 91 Pac. 772, 125 Am. St. 896, 18 L. R. A. (N. S.) 1265, and followed in *Gourley v. Smith*, 78 Wash. 286, 139 Pac. 58, the plaintiff was entitled to maintain his action. The

decision in *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355, rests on different facts.

II. The appellants moved for a nonsuit, the only specific ground mentioned being that no demand upon either of them for the delivery of the automobile was pleaded or proved. It is true that no demand was pleaded, but demand upon Seixas was proved. As to the appellant Elliot Bay Investment Company, no demand was necessary. It claimed the right of possession as owner. This absolved the plaintiff from making demand. *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763. 34 Cyc. 1410, 1411.

III. While the cause was pending on the appellants' motion for a new trial, the Elliott Bay Investment Company moved for leave to file a supplemental answer, setting up the fact that, since the trial, it had been garnished by certain creditors of the respondent, Armour, as a debtor of Armour, or having in its possession property belonging to Armour, and moved for a continuance or stay of proceedings until the determination of the garnishment cases. The court denied permission to file the supplemental answer and refused a continuance or stay. In this, we think the court was partially in error. There was no error in the refusal to stay the entry of judgment. That was a matter resting largely in discretion. The court, however, should have permitted the filing of the supplemental answer and received evidence as to the truth of its allegations. If it then found that, in fact, such garnishments were pending, it should have either stayed the entry of the judgment or incorporated in the judgment a stay of execution, either in whole or in part, as was necessary to protect the appellant from a double liability for the same debt, until the garnishments were disposed of. The appellant, as garnishee, was entitled to some opportunity to protect itself. *Ulrich v. Hower*, 156 Pa. St. 414, 27 Atl. 243. In *Rood on Garnishment*, § 197, what we believe to be the correct rule is stated as follows:

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"In such cases the proper practice is to bring the fact of the garnishment to the attention of the court by motion, petition, plea, or plea puis darrein continuance, as the circumstances may require, whereupon the court will stay all proceedings before judgment, or allow judgment to be entered, with stay of execution, in whole or in part, as justice demands; and if judgment has been rendered, execution will be stayed till the garnishment is disposed of."

See, also, *Blair v. Hilgedick*, 45 Minn. 23, 47 N. W. 310; *Jones & Dow v. Wood*, 30 Vt. 268; *Shealy v. Toole*, 56 Ga. 210; *Belcher v. Grubb*, 4 Har. (Del.) 461. When, as in this case, the trial was completed, and the court, with the facts fresh in mind, was ready to make its findings, the course last mentioned in the text quoted was certainly preferable, and, we think, should have been adopted.

IV. Finally, it is claimed that the judgment should be reversed because there was no proof of the value of the automobile. The finding of value is a necessary part of a verdict to sustain the judgment in cases of this character, when tried to a jury. In *Meeker v. Johnson*, 3 Wash. 247, 28 Pac. 542, this court, speaking through the late Chief Justice Dunbar, quotes, with approval, from § 9 of Cobbey on Replevin, as follows:

"Although the technical action of replevin has been abolished by statutes in many of the states, and, strictly speaking, cannot be said to exist in any of them, an action for the recovery of specific personal property is recognized in nearly all of them, and, generally, all the remedies formerly secured to parties by the action of replevin and trover may be had in a single action of replevin or its statutory equivalent under another name, to recover a chattel, or its value, and damages for its detention;"

and adds:

"This is evidently the object of our statute, to combine the actions of replevin and trover, and to adjudicate in one action all the questions involved, and which are necessary to completely determine and settle the matter in controversy. This is the general policy of the law, and such a construc-

tion will be put upon a statute whenever its terms will permit. The value of the hops was placed in issue by the pleadings. In the event that the hops had been destroyed by fire, or had been disposed of in any way so that a return could not be effected, this value would become very material in enforcing the judgment against plaintiffs, and they should not be put to the expense of another trial and another jury to ascertain a fact which was presented to this jury by the pleadings. We think the cases cited by the appellants sustain this view, and that the verdict was not in compliance with the mandatory provisions of the statute, and therefore illegal."

Obviously, a finding of value by the court is also essential to sustain the judgment where the cause, as in this case, is tried to the court without a jury. The court found the value of the automobile at the time of trial was \$1,000. This was the value alleged in the complaint, but this averment was denied in the answers. No proof of value was offered on either side. The court evidently proceeded upon one of two theories: either that the admission in the answer of the investment company that it sold the automobile to the respondent and his partners for \$1,000, in August, 1911, was evidence of its value at the time of trial, or that the allegation in the affidavit for the writ of replevin that the automobile was of that value when taken was sufficient to put the appellants to proof of a different value. The finding that the automobile was actually worth \$1,000 at the time of the trial cannot be sustained upon either theory. It was immaterial in any event, according to what we believe the better rule under a statute such as ours. The value of the machine at the date of its conversion in December, 1911, was the material thing, not its value at the time of the trial in March, 1913. *Sherman v. Clark*, 24 Minn. 37; *McLeod v. Capehart*, 50 Minn. 101, 52 N. W. 381; *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980. This is the rule in this state in trover and conversion, which is the alternative phase of our action of claim and delivery. *McSorley v. Bullock*, 62 Wash. 140, 113 Pac. 279; *Hetrick v. Smith*, 67 Wash. 664, 122 Pac.

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363; *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364. The evidence is insufficient to enable us to supply the proper finding. The admitted value of \$1,000 in August, 1911, was not sufficient evidence to sustain a finding of that value in December, 1911. Several months had elapsed during which the respondent and his former partners had used the machine. It is matter of common knowledge that machinery such as this may deteriorate rapidly with use.

Nor will the other theory support the finding. It is true, as held in *Peterson v. Woolery*, 9 Wash. 390, 37 Pac. 416, that the value stated in the affidavit will be taken as the true value at the time of the taking unless the defense gives some evidence showing a different value. In the present case, however, that rule cannot apply, since the record fails to show that either the affidavit for the writ or the writ itself was ever served upon either of the defendants. The sheriff's return merely recites that he received the writ, affidavit and bond on January 26, 1912, and "after diligent search and inquiry, was unable to find any of the personal property described in the said affidavit in replevin, in King county." The appellants should not be held bound by a recital of value in an affidavit which was not shown to have been served upon them, especially when the same allegation of value in the complaint was put in issue by their answers.

The appellants insist that, for this failure of proof, the judgment should be reversed and the action dismissed. We are of the opinion, however, that substantial justice will better be served by remanding the cause, to the end that additional evidence be taken, a finding of value made thereon, and the judgment modified accordingly. *Springer v. Ayer*. 50 Wash. 642, 97 Pac. 774.

The cause is remanded with directions for further proceeding in accordance with this opinion.

CROW, C. J., GOSE, MAIN, and CHADWICK, JJ., concur.

[No. 11962. Department One. June 25, 1914.]

JOHN BURKE *et al.*, *Respondents*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

APPEAL—DECISIONS APPEALABLE—GRANTING NEW TRIAL. An order vacating a judgment against minors for fraud in procuring it, and allowing the guardian to substitute his complaint for the original complaint in the action, and providing for further proceedings therein according to law, is appealable as an order affecting a substantial right which grants a new trial, within Rem. & Bal. Code, § 1716, subd. 6.

Motion to dismiss an order of the superior court for Spokane county, Huneke, J., entered March 18, 1914, vacating a judgment and granting a new trial. Denied.

Cannon, Ferris & Swan, for appellant.

A. O. Colburn and Luby & Pearson, for respondents.

GOSE, J.—On the 10th day of August, 1909, a compromise judgment was entered in this action, in favor of the plaintiffs and against the defendant, for the sum of \$1,000 damages, for the death of Edward Burke, the husband of the plaintiff Birdie Burke and the father of the minor plaintiffs, in consequence of the alleged negligence of the defendant, which judgment was later paid and satisfied of record. On the 18th day of March, 1914, upon the petition of the minor plaintiffs, by Joseph B. Stell, their guardian, the judgment was vacated as to the minors, on the ground of constructive fraud. The conclusion of law is that there was constructive fraud participated in and practiced by the defendant railway company, Birdie Burke, and her attorney, in obtaining the judgment in the action, resulting in erroneous proceedings against the minors. The order is "that Joseph B. Stell, as guardian of the petitioners, be and he is

¹Reported in 141 Pac. 364.

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Opinion Per GOSZ, J.

hereby substituted for Birdie Burke as guardian *ad litem*, and permitted to substitute for the original complaint in this action the complaint tendered with the petition herein, and that further proceedings be had in this action according to law and the rules of this court." The defendant has appealed.

The respondents have moved to dismiss the appeal. They contend that the order only vacates the judgment and hence is not appealable, citing *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902; *Jones v. Paul*, 56 Wash. 355, 105 Pac. 625; *Wilson v. McGillivray*, 58 Wash. 291, 108 Pac. 620; *Molloy v. Union Transfer etc. Co.*, 60 Wash. 331, 111 Pac. 160. In each of these cases, a default judgment had been entered in favor of the plaintiff, and the judgment was vacated at the suit of the defendant. They hold that an order vacating a judgment is not appealable.

Our statute, Rem. & Bal. Code, § 1716, subd. 6 (P. C. 81 § 1183), authorizes an appeal "from an order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or . . . (3) grants a new trial." We think the effect of the judgment is to grant a new trial. The respondents had no other purpose in moving to vacate the judgment. The order vacating the judgment will be of no value to them except as it permits them to re-prosecute the same action or to prosecute an independent action for the same cause. It permits the guardian to substitute his complaint for the original complaint in the action, and provides that further proceedings be had according to law and the rules of the court. This means, of course, a new trial, and we think distinguishes the case from the authorities cited. In each of those cases the only purpose of the defendants was to have the judgment vacated. A new trial, if any, was at the option of the party adversely affected by the vacation of the judgment. A different question is presented

where a judgment in favor of the plaintiffs is vacated at their suit in order that they may have a new trial of the issues.

The motion is denied.

CROW, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11929. Department One. June 25, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Northern Pacific Railway Company, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

CERTIORARI—WHEN LIES—ADEQUATE REMEDY BY APPEAL. Certiorari does not lie when there is an adequate remedy by appeal.

Application filed in the supreme court March 28, 1914, for a writ of certiorari to review a judgment of the superior court for Spokane county, Huneke, J. Writ denied.

Cannon, Ferris & Swan, for relator.

A. O. Colburn and Luby & Pearson, for respondent.

PER CURIAM.—This is an application for a writ of review. Inasmuch as we have held that the relator has an adequate remedy by appeal, the application for the writ is denied. *Burke v. Northern Pac. R. Co.*, ante p. 188, 141 Pac. 364; Rem. & Bal. Code, § 1002 (P. C. 81 § 1729); *Jones v. Paul*, 56 Wash. 355, 105 Pac. 625.

¹Reported in 141 Pac. 365.

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Opinion Per Gose, J.

[No. 11371. Department One. June 26, 1914.]

RICHARD KLEESATTEL *et al.*, Appellants, v. H. E. ORR *et al.*,
Respondents.¹

PARTNERSHIP—ACCOUNTING BETWEEN PARTNERS — ADVANCES — REPAYMENT. Where partners had agreed to own a certain share in a mine, share and share alike, and one of them gave his note in payment therefor, upon an accounting, one-half of the sum, with interest, should be charged to the other partner, and credited to the maker of the note.

Appeal from a judgment of the superior court for King county, Raymond G. Wright, Esq., judge *pro tempore*, entered May 29, 1912, upon findings in favor of the defendants, in an action for an accounting. Modified.

Vanderveer & Cummings and *Brightman, Halverstadt & Tennant*, for appellants.

Dudley G. Wooten, for respondents.

Gose, J.—Action for accounting between two partners in a mining deal. The items in dispute require a statement of the following facts: Plaintiff Richard Kleesattel, a mining engineer, and defendant H. E. Orr, a real estate broker, in May, 1910, purchased, in the defendant's name, an option to purchase a mine in Nevada, the price of said mine being \$100,000 payable in deferred installments. One Hewitt bought one-third of this option contract, agreeing to pay therefor one-third of the contract price of the mine and one-third of the operating expenses, and to carry one-fifth of his share for plaintiff, to be repaid him on demand. Plaintiff and defendant then agreed, that the latter should sell another third on the same terms as the Hewitt sale; that the remaining third and one-fifth of the other two-thirds should be owned by them in equal shares; that defendant should advance \$6,000 if necessary, and more at his option, for the

¹Reported in 141 Pac. 355.

development of the mine, half of which should be repaid by plaintiff on demand out of the proceeds of his interest, and that the two should share and share alike in all the profits and expenses of the venture. The remaining third was sold to one Turner and others, but later the purchasers, being dissatisfied with the management of the mining operations, demanded a return of the money they had put in. Thereupon defendant gave them his note for the amount—\$5,610.42—and Mary F. Kleesattel, the wife of plaintiff, as part of the latter's share, deeded to Orr a lot which realized \$1,800. In August, 1910, defendant secured from the owners of the mine an agreement to pay him ten per cent commission on all sales thereafter made. The proceeds of this contract it was agreed should be divided equally between plaintiff, defendant, and Hewitt. The latter having demanded of plaintiff payment of the cost of the one-fifth interest carried by him, plaintiff gave his note therefor. Plaintiff acted as mining engineer and superintendent in charge of the mine. The court rendered a judgment for the defendants in the sum of \$4,002.52, as against plaintiff, to be satisfied out of the dividends upon his mining stock and receipts from the commission agreement heretofore mentioned; and a further absolute judgment of \$1,553.31 against plaintiff and the community composed of plaintiff and Mary F. Kleesattel, his wife. The latter have appealed.

Appellants complain that the court has credited Orr with one-half of \$1,705.42, advanced by Mrs. Kleesattel to meet certain expenses, when instead he should have been debited with one-half, or Kleesattel credited with the full amount. The court does credit Orr with this one-half, but at the same time he credits Kleesattel with the same amount; thus offsetting the Orr credit and leaving the account as if that sum had not been mentioned. After finding the amount for which Kleesattel is absolutely liable to Orr, he deducts therefrom \$852.71, which Kleesattel carried for Orr on that item; thus making the account correct.

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Again, appellants say that the court credited Orr with \$5,610.65, the whole of the Turner payment, when Kleesattel paid \$1,800 on that item. Counsel overlook the fact that the court's statement is divided into two parts. In order to segregate the contingent from the absolute liability, he first finds what Orr carried for Kleesattel on the whole mine. In doing this he credits Orr with \$5,610.65 because he actually put up his note for that amount. By dividing this credit of Orr's in two equal parts, the court finds what Orr was carrying for Kleesattel. In other words, the court really finds that Orr was carrying for Kleesattel on this item \$2,805.32. Then the court divides Kleesattel's entire liability in two equal parts and debits him with one-half as contingent liability and one-half as absolute liability, it being admitted that Kleesattel was absolutely liable for one-half of the Turner interest, including expenses chargeable thereto. In the second part of the court's statement, he shows Orr's absolute liability to Kleesattel. This consists of one-half the \$1,705.42 item, or \$852.71, which Kleesattel carried for Orr, and the \$1,800 payment Kleesattel had made on the Turner interest. By deducting the sum of these items from Orr's absolute credit, he finds Kleesattel's absolute liability to Orr. The following statement may show this analysis more clearly:

Amount credited to Orr (excluding items of	
\$5,610.65 and \$852.71).....	\$13,860.94
Amount credited to Kleesattel (excluding items	
of \$1,705.42 and \$1,800).....	3,461.50
	<hr/>
Balance in favor of Orr.....	\$10,399.44
Amount carried by Orr for Kleesattel exclusive	
of Turner payment ($\frac{1}{2}$ of above).....	5,199.72
Amount carried by Orr for Kleesattel on Turner	
payment ($\frac{1}{2}$ of \$5,610.65 paid by Orr).....	2,805.32
	<hr/>
Total amount carried by Orr for Kleesattel...	\$ 8,005.04

Contingent liability of Kleesattel to Orr ($\frac{1}{2}$ of above)	4,002.52
Absolute liability of Kleesattel to Orr ($\frac{1}{2}$ of above)	4,002.52
Absolute liability of Orr to Kleesattel:	
$\frac{1}{2}$ of \$1,705.42 payment.....	\$ 852.71
Part payment on Turner interest..	1,800.00
	<hr/> 2,652.71
Balance	\$1,349.81
Items of interest added by the court.....	203.50

Total absolute liability of Kleesattel to Orr....\$1,553.31

As a matter of fact, the court treated the \$1,800 and the \$852.71 items, not as payments by Kleesattel, but as loans to Orr; hence, credited Orr with them and made him absolutely liable to Kleesattel for their repayment. If these items had been intermingled with the other expenses of the mine, Kleesattel's contingent liability would have been decreased and his absolute liability increased, and Orr would have been relieved of any absolute liability whatever.

The court found it was agreed that Kleesattel should have a reasonable salary for his services as mining engineer, but that no definite amount was fixed; that it was to be paid only upon the success of the mining venture; that such venture was not yet successful, and that he acted in such capacity for ten months. Appellants claim that \$300 a month was fixed as the amount of such salary, and that Kleesattel is entitled to a credit of two-thirds of \$3,000 on this account. Upon this question, the letters of Orr indicate that Kleesattel was to have a salary, but his oral testimony, as well as the testimony of Hewitt, is in harmony with the findings of the court, as are also Kleesattel's letters to Orr. On July 10, 1910, Kleesattel said among other things, in a letter addressed to Orr: "If I was not sure I could make good here, I would get out mighty quick of this God-forsaken place,

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where I work my blamed head off without any salary." He now claims that there had been a verbal arrangement between Orr and himself for him to have a salary, and that Orr's letter to which reference has been made was only confirmatory of the oral agreement. The oral contract upon which he relies, if made, was made before Kleesattel wrote this letter. The testimony is so conflicting that, in the light of Kleesattel's letter, we are not prepared to say that the court did not correctly decide this question.

As we have said, the court found that Hewitt was to carry one-fifth of his interest for Kleesattel, to be paid for by Kleesattel in cash on demand. The court further found that it was agreed between Kleesattel and Orr that the one-fifth interest held by Hewitt for Kleesattel should be owned by Kleesattel and Orr share and share alike. On the 20th day of May, 1911, Kleesattel gave Hewitt his note for \$3,182.61 with interest at eight per cent per annum in payment of that interest. One-half of this sum, with interest, should be charged to Orr, and credited to Kleesattel, upon his absolute liability.

In all other respects we adopt the findings of fact and the conclusions of law of the trial court. Aside from the modifications made, we think the trial court reached as nearly a correct conclusion upon the merits as any human tribunal can. We say this in the light of the voluminous record, the conflict between the oral testimony and the letters of both Orr and Kleesattel, both of whom wrote one way and talked another.

The case will be remanded with directions to enter a judgment in harmony with this opinion.

CROW, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11603. Department One. June 26, 1914.]

ALTON LOUIS GREGG, *a minor, etc., Respondent*, v. KING
COUNTY, *Appellant*.¹

WHARVES—PUBLIC DOCK—CONSTRUCTION—NEGLIGENCE—LIABILITY OF COUNTY—QUESTIONS FOR JURY. The negligence of a county in maintaining a public dock with a loose fender-pile, whereby a child's hand was caught and crushed, is for the jury, where experts testified that the proper and safe construction was to have the fender-piles bolted to the dock, it being admitted that this would have prevented the injury.

WHARVES—PUBLIC DOCKS—MAINTENANCE—LIABILITY OF COUNTY. A county is bound to exercise the same degree of care for the safety of the public in the maintenance of a public dock at the termination of a county road as is required in the case of public highways; especially in view of the statute authorizing the maintenance of county docks only at the termination of county roads.

NEGLIGENCE—DANGEROUS PREMISES—PUBLIC DOCK—TRESPASSERS—CHILDREN. A child of tender years (six), accompanying an older brother who was sent on an errand to a public dock to meet a steamer, is not a trespasser in going upon the dock, which was at the termination of a county road.

NEGLIGENCE—DANGEROUS PREMISES—PLACES ATTRACTIVE TO CHILD. A county is charged with notice and bound to anticipate that a public dock at the termination of a county road is a place attractive to children and might be used by them for recreation, especially where the county allowed a confectionery stand upon the dock.

SAME—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS. In the absence of evidence to the contrary, a child of six or seven years of age is presumed to be incapable of contributory negligence.

NEGLIGENCE—PERSONAL INJURIES—ACTION BY CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT. In an action by a minor child of tender years to recover for his own personal injuries, the contributory negligence of his parents is no defense.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$3,202, for personal injuries sustained by a child, whose hand was crushed so that it was stiff and lacked the power of gripping and probably would never be as strong as a normal hand, and one finger had to be amputated, is not so excessive as to indicate passion or prejudice.

¹Reported in 141 Pac. 340.

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Appeal from a judgment of the superior court for King county, Tallman, J., entered June 30, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained upon a public dock. Affirmed.

John F. Murphy and *Robert H. Evans*, for appellant.

B. J. Shipman and *Dudley G. Wooten*, for respondent.

ELLIS, J.—This action was brought to recover damages for injuries sustained by the plaintiff, a boy between six and seven years old, through the alleged negligence of the defendant in the construction and maintenance of its dock, at Juanita, on the eastern shore of Lake Washington.

The facts are practically undisputed. The dock in question was owned and operated by the county for the use of the public in connection with boats touching at Juanita. It was constructed on wooden piles, driven into the bed of the lake. The floor was of planking, and was bounded on its outer edge by a line of beams or "stringers," rising about ten inches above the floor. These, at the southerly side of the dock, where the accident occurred, were flush with the edge of the dock. At that side were driven piles about a foot in diameter, called "fender-piles," the purpose of which was to receive the impact of boats and to protect the wharf. The pile causing the injury was driven into the bottom of the lake eight or ten feet, and rose alongside the dock to a height of about a foot and a half above the stringer. It was not bolted to the dock, and there was a space of four or five inches between it and the dock.

A few feet east of this fender pile was a small warehouse for storing freight, and a few feet west was a slip or incline for the convenience of persons going to and from the boats. A few feet north of the warehouse was a small confectionery store. Contiguous to the wharf on the shore side, and constructed upon a trestle on a level a little above the floor of the wharf, ran the road from Juanita to Kirkland. A line of

boats ran to this dock regularly, making four or five landings a day to receive and discharge freight and passengers.

The dock was regularly used by the public in meeting, embarking upon, and leaving boats. Among the persons thus using the dock, were the older brother and sister of the plaintiff, one of whom was sent there daily by their parents to meet the boat arriving at five o'clock in the afternoon and receive the Seattle paper. On August 9, 1912, the plaintiff's older brother, aged nine, accompanied by the plaintiff, visited the dock for this purpose, arriving a few minutes in advance of the boat. They seated themselves in the narrow space between the warehouse and the slip, and on the stringer running along the edge of the dock, their feet resting upon the floor. The plaintiff was sitting behind the fender-pile above mentioned, his right arm around the pile, and his left arm hanging down between the pile and stringer upon which he was seated. He remained in this position, watching the incoming boat, until the vessel struck the fender-pile, driving it against the dock, and mashing his left hand between the pile and the stringer. The hand was crushed so that it was necessary to amputate the little finger, the skin from the palm of the hand and on the forearm was badly lacerated, and the whole hand was severely bruised. After the arm was healed, a large scar remained, and the hand was stiff and lacked the power of gripping. Physicians who examined the boy testified that the injured hand does not perform its normal functions, that it is doubtful whether or not the hand will ever be as strong as a normal hand, and that the scar on the arm will be permanent. The plaintiff resided with his parents over a quarter of a mile from the dock and had been repeatedly warned by his parents not to go upon or play upon the dock.

It is undisputed that, if the fender-pile in question had been bolted to the dock, this accident would not have happened, and it appears that many of the piles about this dock were bolted at the time of the accident. There was

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some dispute as to whether a bolted pile would be as adequate a protection to the dock as a loose one; but the county inspector of docks and bridges, a witness for the defendant, testified that, about four years before the trial, the county engineer's office had adopted the plan of bolting the fender-piles to the county docks in order to keep them in place. Another witness, a structural engineer, who had had charge of the construction of bridges and docks for King county during the year 1912, and under whose direction the dock here in question had been repaired in May and June of that year, testified that he had constructed and repaired seventy-five or eighty docks and that, according to the approved and safe method of construction, a fender-pile such as that which caused the injury should be bolted to the dock, and that a pile not so bolted would be dangerous.

At the close of the plaintiff's case in chief, the defendant moved for a nonsuit, which was denied. The jury returned a verdict upon all the evidence and the court's instructions, for the sum of \$3,202 and costs. The defendant appealed.

The appellant assigns as errors: (1) the overruling of the motion for a nonsuit; (2) the giving of certain instructions and the refusal to give certain requested instructions; (3) the refusal of a new trial because of these things and because of excessive verdict.

I. The appellant claims that its motion for a nonsuit should have been granted because no actionable negligence on its part was shown. It is argued that the function of a given structure controls the plan of construction; that the wharf here in question was built only to accommodate travel and traffic on the lake; that its construction was reasonably safe for that purpose; that it was not intended as a lounging place or playground for trespassing children and that the fact that it was unsafe for that purpose was no evidence of negligence, since the presence of children on the dock and an injury such as occurred could not have been anticipated. The vice of this argument consists in the initial assumption

that the wharf, as constructed, was, as a matter of law, reasonably safe for all things connected with traffic and travel. Let us suppose that this child had gone onto the wharf with his elder brother or, for that matter, with his parents, for the purpose of taking passage upon the boat, and, while waiting alongside the slip for the boat to make a landing, the child had been injured just as he was injured. Eliminating, for the present, the question of contributory negligence, it is clear that, under the evidence, the question of the appellant's negligence in leaving the fender-pile loose and insecure, contrary to its own plan of construction adopted three or four years previously, would have been a question for the jury. The question of primary negligence, like that of contributory negligence, is always a question of fact for the jury and not a question of law for the court, whenever the minds of reasonable men might differ as to its existence. *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351. 1 Thompson, Negligence (2d ed.), § 425.

The second phase of this argument is also unsound in assuming that, as a matter of law, the child who was injured was a trespasser not using the dock for, or in connection with, any purpose for which it was intended. The argument overlooks the fact that this dock was a public dock, intended for the use of all members of the public, children as well as adults. While we have held that a public dock is not a highway in such sense as to extend the right of eminent domain conferred by statute for the acquiring of rights of way for highways to the acquiring of dock sites, such statutes being strictly construed, and not extended by mere analogy (*State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E. 1716), it is none the less true that a public dock is a public place, maintained by the county under statutory authority (Rem. & Bal. Code, § 8114, P. C. 533 § 9), for the public use and convenience. There is, therefore, the same duty upon the county to exercise reasonable care for the safety of the public and all persons having

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occasion to use such docks as is found in case of public highways, since both are, broadly speaking, public ways. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. 685; 2 Shearman & Redfield, *Negligence* (6th ed.), § 333. As further sustaining this view, the statute above referred to authorizes the construction and maintenance of such wharves only at the termination of a county road at or near the shore of navigable waters or water courses, thus recognizing a use of such wharves in connection with, and impliedly coextensive with, the use of such roads.

It would seem, therefore, that the child here in question had the same right upon this dock that it would have had upon the trestle forming the road immediately contiguous thereto. Unquestionably, had this child been injured in passing along the trestle, which constituted the public road at this point, by reason of a structural defect in the trestle, he would have had the right to recover from the county for such injury. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64. Moreover, even assuming that a child six years of age is capable of trespass in the strict legal sense—a thing upon which we have more than once expressed doubt (*Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147; *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N. S.) 331; 1 Thompson, *Negligence* (2d ed.), § 1026),—this child was not a trespasser under the circumstances shown by the evidence. He visited the wharf in company with his brother on an errand connected with the purpose for which the wharf was intended. Even taking the appellant's restricted view of the matter, visiting the dock to receive a newspaper was as lawful an errand as a visit to receive freight or to meet a friend. True, the boy was not sent on this errand with his brother, but his presence would have been no more necessary had he been sent by his parents with the brother. Obviously, the mere circumstance of such sending could have no effect upon the quality of his act. It could not change a trespass to an

innocent visit, yet we have held, in effect, that a child six years old sent by a parent with an older sister to the post office in a populous city was rightfully on the street. *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912 B. 842.

Nor are we impressed with the assertion that the presence of young children on the dock could not have been anticipated. Being a public dock, the appellant was chargeable with notice that it might be used, just as a public street, road or other public place may be used, by any member of the public. It is not claimed that any notice was given or measures of any kind taken to exclude children. Under such circumstances, it has even been held that the use of a public wharf for recreation is such lawful use that a parent may recover for the death, caused by a structural defect in the wharf, of a boy eight years old so using it with the parents' knowledge. *Delaney v. Pennsylvania R. Co.*, 29 N. Y. Supp. 226; see, also, *Gluck v. Ridgewood Ice Co.*, 9 N. Y. Supp. 254. No decision of any court has been cited to the contrary. In addition to this, the presence of the confectionery stand upon the dock, which it must be assumed was there with the appellant's permission, was an implied invitation to children and others to visit the dock for purposes not strictly connected with its function as a wharf. The appellant can hardly be heard to say that the presence of children could not reasonably have been anticipated. *Harriman v. Pittsburg, C. & St. L. R. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. 507. "The liability in such a case should be coextensive with the inducement or implied invitation." *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128; *Sweeny v. Old Colony & Newport R. Co.*, 10 Allen 368, 87 Am. Dec. 644. Under the circumstances disclosed by the evidence, we are clear that the question of the appellant's negligence was properly submitted to the jury.

The appellant intimates, rather than argues, that the non-suit should have been granted because of contributory negli-

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gence on the child's part. Contributory negligence was charged in the answer, and the court gave the usual instruction as to the affirmative nature of this defense and that to be available the defense must be established by the evidence. No evidence was offered as to the capacity of this child. In the absence of evidence to the contrary, a child of six or seven years of age "is everywhere presumed to be incapable of contributory negligence." 1 Shearman & Redfield, Negligence (6th ed.), § 73a. The motion for a nonsuit was properly overruled.

II. The court instructed the jury to the effect that no act of negligence on the part of the parents of the child, whether of omission or commission, could prevent a recovery by the child if, under the evidence and other instructions, the jury was of the opinion that the defendant was liable for the injuries sustained by the child; that the rights of the parties must be judged without regard to acts of negligence on the part of the child's parents, and that:

"It would not necessarily be negligence in law for the parents to send the plaintiff, aged six years, along with his older brother, aged ten years, to the public dock at Juanita, to meet the boat for the purpose of getting a newspaper or to permit him to go with the older brother, but even if the facts should be such as to lead the jury to believe that the parents were negligent in that regard, that can make no difference as to the right of the plaintiff to recover if the facts as shown by a preponderance of the evidence and the law as given you by the court entitled him to a verdict at your hands."

The appellant contends that, in these instructions, the court went entirely too far in exonerating the parents from any duty in the custody and control of the child. The whole argument in this connection is based upon the doctrine of imputed negligence. The only logical basis for the doctrine of imputed negligence is tersely stated by Shearman & Redfield as follows:

"The ethical proposition at the basis of the legal theory is that the person to whom the negligence of another is imputed, owing to the relation between them, ought to be held responsible for the conduct of such other in respect to the cause of the injury." 1 Shearman & Redfield, Negligence (6th ed.), § 65a.

In cases of injury to, or wrongful death of, a child, where the action is brought by a parent for his own benefit, the contributory negligence of the parent, the actual plaintiff, will, of course, bar a recovery. It is obvious that such cases afford no support to the doctrine that the negligence of the parent is to be imputed to the child. Both the ethical basis of the rule of imputed negligence and sound authority sustain the view that, where the child is the real plaintiff in an action for his own injury, the parent's contributory negligence is no defense. This view is certainly sustained by reason, and is now supported by the great weight of authority. 1 Shearman & Redfield, Negligence (6th ed.), § 71. *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670; *Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. 759; *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 South. 555, 3 Am. St. 751; *Atchison, T. & S. F. R. Co. v. Calhoun*, 18 Okl. 75, 89 Pac. 207; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67. At any rate, this court is committed to that view. *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64. There was no evidence in this case from which it could be held, as a matter of law, that the parents were guilty of any negligence. The mother was ill and the father was away from home. The child who was injured accompanied his elder brother to the dock without the knowledge of either parent, but even had the parents known of the fact, or had they sent the child to the dock with his brother on the errand in question, that would not have constituted negligence as a matter of law, even in a suit for the parents' benefit.

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Tecker v. Seattle, Renton & S. R. Co., supra. We find no error in the instructions above referred to. They correctly stated the law of the case as applied to the facts presented.

The court also instructed the jury as follows:

"In this case the degree of care and prudence required by law of the defendant must be considered with reference to the uses and purposes for which the dock or wharf where the accident occurred was constructed, maintained and operated. It is admitted by the pleadings that this dock was a public one, owned and operated by the county, the defendant, and as such you are instructed that it was open to be visited by all classes of people, including children who might be drawn there by curiosity or interest in the arrival and departure of boats, or who might be sent there on errands for their parents."

It is urged that this instruction was erroneous in that it was contrary to the theory of the respondent's complaint. We find it unnecessary to enter into a lengthy analysis of the complaint. It must suffice to say that the complaint alleged that this dock was a public dock, owned and operated by the county. From what we have already said in discussing the question of nonsuit, it is clear that the instruction correctly states the law relative to such places. We find it unnecessary to discuss in detail the instructions requested by the appellant. They were addressed to a theory of the law in direct antagonism to that upon which the instructions were given, and which we have found correct. They were properly refused.

III. Finally, it is urged that the verdict is excessive. While, on first impression, the recovery may seem large in view of the nature of the injuries, yet, when we consider that this child must go through life with a maimed hand, we cannot say that it is so large as to indicate passion or prejudice on the part of the jury. A careful consideration of the evidence convinces us that the injuries are permanent and that the child will never have the same use of the injured hand that it would have enjoyed of a normal hand. One of the

physicians testified that certain operations might tend to relieve the hand of its stiffened condition, but even he did not predict such a result with any degree of certainty.

We find nothing in the record before us warranting a reversal of the judgment, or a reduction of the recovery.

The judgment is affirmed.

Crow, C. J., MAIN, and Gose, JJ., concur.

[No. 11613. Department Two. June 26, 1914.]

ANGUS McIVER, *Appellant*, v. ROBERT O. HILSTAD *et al.*,
Respondents.¹

ESTOPPEL—IN PAIS—INCONSISTENT CLAIMS—ERROR IN DEED. A grantor is estopped to claim error in the description by metes and bounds in his deed, in that it contained a larger tract on the north side than he intended to convey, which he had marked on the ground at the north by monuments, where, years after, to settle a dispute with a predecessor in interest of the grantee as to the location of the south boundary, he ignored his monuments, and measured the ground from the calls in the deed, which he adopted, and thereby gained his contention as to the south boundary, which he would have lost if he had followed his monuments and present claim of error.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE. Subsequent purchasers of portions of a tract conveyed to their common grantor are not bound to take notice of his improvements and inclosures as indicating an error in the description in the deeds, where his fences only partially inclosed the land; but they are *bona fide* purchasers where they bought with reference to the description contained in the deeds as they appeared on the public records, under Rem. & Bal. Code § 8771, providing that *bona fide* purchasers take the full legal record title from grantors holding the same.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered June 4, 1913, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Affirmed.

¹Reported in 141 Pac. 306.

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Opinion Per FULLERTON, J.

Fredk. R. Burch and Oliver Hulbach, for appellant.

W. A. McLeod, for respondents Hilstad.

John P. Fay, for respondents Brown *et al.*

FULLERTON, J.—On December 30, 1882, the appellant Angus McIver acquired title to Lot 5, of Section 13, in Township 25, North of Range 1, East of the Willamette Meridian. The tract was practically square in shape (save that the southern boundary followed the shore of Brown's bay), the side and end lines being some 1,320 feet in length. On the east side, also, a lagoon, or arm of the bay extends for a short distance into the tract, but in the record of the government survey of the tract this seems not to have been noted. On October 8, 1900, McIver conveyed, by warranty deed, to one M. J. Berg, a portion of the lot described as beginning 360 feet south of the Northeast corner thereof, and running thence West 370 feet; thence South one degree East $86\frac{1}{2}$ feet; thence South eighteen degrees East 295 feet; thence South fifty-two degrees East 132 feet; thence North fifty-three degrees East $161\frac{1}{2}$ feet; thence due North 340 feet to the place of beginning. Berg had theretofore leased from McIver a tract of land, and had placed thereon certain improvements, which included a store building, and the description was seemingly intended to bound the lands containing the improvements. On December 6, 1900, Berg conveyed the property by the same description to one W. H. Belknap, who on December 29, 1902, conveyed it to one G. O. Hilstad.

On May 12, 1903, G. O. Hilstad conveyed to C. E. Malmberg a portion of the property conveyed to him by the deed from Belknap, described as follows: beginning at a point 360 feet South and 370 feet West of the Northeast corner of lot five (in the section, township and range above given), and running thence South one degree East $86\frac{1}{2}$ feet; thence South eighteen degrees East $88\frac{1}{2}$ feet; thence East to beach at high tide water, being about 120 feet; thence North along

the beach at high tide water to a point due East of place of beginning; thence West to place of beginning. Subsequently this latter tract, by the same description, was conveyed by Malmberg to Millie E. Weber, and by Millie E. Weber to Robert A. Brown, one of the respondents in this action; the last conveyance being made on February 17, 1909.

After G. O. Hilstad acquired the property formerly conveyed to Berg, it was found that the description did not include the land on which the store building stood which Berg had erected, and McIver insisted that Hilstad purchase additional ground or abandon the building. After some negotiation Hilstad agreed to purchase such ground and a deed was executed to him by McIver describing a tract of land beginning 360 feet South of the Northeast corner of lot five and running thence West 370 feet; thence South on a line parallel to the East line of said lot five to the South boundary thereof; thence following the boundary lines to the East and North to the place of beginning. This description was afterwards discovered to contain a larger tract of land than McIver agreed to convey or Hilstad agreed to purchase. Indeed, it seems to have included a part of McIver's orchard, if not some of his buildings. To correct the mistake, the parties mutually agreed upon a line which they marked in part by monuments set in the ground. Hilstad thereupon redeeded to McIver the land conveyed to him by the incorrect description, and received another deed from McIver conveying a tract according to the monuments set on the ground. This description as read into the record, is as follows: "Beginning at a point 360 feet South of the Northeast corner of lot five, section thirteen, township twenty-five north, range one East, W. M., thence West three hundred and seventy feet; thence South one degree East 86½ feet; thence Southeasterly 300 feet, more or less, on an angle of about eighteen degrees East, to a stone monument, to wit, a stone set into the ground and marked with a cross (X); thence Southerly thirty-two feet nine inches to a stone

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monument, to wit, a stone set into the ground marked H; thence Southeasterly ninety-seven and one-half feet to a stone monument, to wit, a stone set in the ground marked M, which said last mentioned stone is located on the immediate bank of Brown's Bay about ten feet from mean high tide; thence due east to an intersection with the east line of said lot five; thence north along said line to the place of beginning, according to the government plat of said premises;" saving and excepting therefrom such land as McIver had conveyed from lot five to other parties, the descriptions of which are set out by metes and bounds.

On June 11, 1910, G. O. Hilstad conveyed the property by the last mentioned description to Theo. B. Hilstad and Robert O. Hilstad, respondents in this action. Hans Christensen and Elsa M. Christensen have an interest in the property by virtue of a contract of purchase, executed to them by Robert A. Brown and wife.

Subsequent to the execution of the deed from G. O. Hilstad to Theo. B. and Robert O. Hilstad, McIver conceived that his last mentioned deed to G. O. Hilstad conveyed a larger tract of land than he intended to convey. His present contention is that the common starting point of all of the deeds is some seventy feet further south than the descriptions give it, and the north line of tract, instead of being 370 feet, is but 297 feet in length. In other words, the land conveyed should be described as commencing 437 feet south of the northeast corner of lot five, and run thence west 297 feet, and from thence follow the courses as given in the deeds. This would leave a strip of land some seventy feet in width lying on the north side of the tract conveyed and a like strip on the west some 73 feet in width at its north end and tapering to a common point at the first of the monuments before described.

This action was begun by McIver to quiet title in himself to the land so claimed to have been erroneously conveyed. Issue was taken on the complaint and a trial had, which re-

sulted in a judgment to the effect that he take nothing by his action.

The testimony on the part of the appellant tended to show that, prior to the execution of the deed from the appellant to Berg, the appellant and Berg went upon the ground and set a stake at the northwest corner of the tract intended to be conveyed, and from such stake marked out the boundary lines of the tract; that, in determining the position of this stake, they measured from the north line of lot five, and conceived the stake to be 360 feet south and 370 feet west of the northeast corner of such lot, whereas it was actually some 437 feet south and 297 feet west thereof. It is sought to hold the subsequent purchasers to the lesser tract by showing that Berg entered into possession of the lesser tract and made his improvements and inclosures with reference thereto, and that these improvements and inclosures were in existence at the time of the subsequent conveyances, and was thus notice to the subsequent purchasers of the lands held and claimed by Berg; that they actually purchased with reference thereto, making claim to the larger area only when they discovered that the description contained in the deeds included such area.

The record, however, as we read it, does not justify these contentions. In the first place, McIver himself, has not maintained a consistent position with reference to the commencement corner. In his dispute with G. O. Hilstad, which resulted in Hilstad's purchase of the ground on which the store building stood, he began his measurements, according to his own testimony, at a point 360 feet south of the north boundary line, or 70 feet north of the stake which he now claims as the corner set by himself and Berg. Measuring from this point, the store buildings were found to be without the boundaries of the tract conveyed to Berg; whereas Berg testified that measurements begun at the stake would have shown that the store building was within the boundaries of his purchase. Again, the several conveyances of other parts of lot

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five made by McIver were made with reference to the description contained in the deed to Berg, and not with reference to the stake. For example, he conveyed to one Ogle a tract 360 feet wide extending across the north side of lot five, and to one Carlson, or his predecessor in interest, a tract of five acres lying south of the tract conveyed to Ogle and west of the tract conveyed to Berg. These tracts, if the descriptions in the several deeds be taken as correct, close naturally upon the several boundaries of lot five, and upon each other; while, if the appellants' present contentions be correct, they do not so close, but leave in the grantor narrow and irregular tracts between the boundaries, the retention of which could seemingly hardly have been intentional as they could serve no useful purpose.

It seems to us, also, that the final deed of correction between McIver and G. O. Hilstad, ought to be held determinative of the rights of the parties to the land included within its boundaries. To obtain the description for this deed, the parties went upon the ground, made measurements and set monuments, and drew the deed with reference to the description so obtained. In making these measurements, as we have shown, McIver expressly ignored the stake set by himself and Berg and made them with reference to the description contained in the deed. If men may be estopped by their acts, we think this act on the part of McIver ought to estop him from now claiming that the stake marked the true corner or the boundary line of the land actually described in the deed.

Nor do we think the record justified the contention that the subsequent purchasers from Berg bought with reference to Berg's improvements. These improvements are but vaguely described in the record. They consisted in part of fences and in part of buildings. At best, the fences but partially enclosed the land conceded to have been included in the description contained in the deed; a part of the land being without the enclosure entirely, whether its boundaries be as described in the deed, or as McIver's subsequent contentions narrow

such boundaries. On the other hand, all of the subsequent purchasers testify that they purchased with reference to the description contained in the deeds as they appeared on the public records, either without knowledge of the enclosures, or with knowledge that the lands described in the deeds contained lands the boundaries of which were not included within them. They are therefore entitled to protection under the provisions of the statute relating to *bona fide* purchasers of real property without notice. Rem. & Bal. Code, § 8771 (P. C. 95 § 35). This section provides:

“Whenever any person, married or single, having in his or her name the legal title of record to any real estate, shall sell or dispose of the same to an actual *bona fide* purchaser, a deed of such real estate from the person holding such legal record title to such actual *bona fide* purchaser shall be sufficient to convey to and vest in such purchaser the full legal and equitable title to such real estate free and clear of any and all claims of any and all persons whatsoever not appearing of record in the auditor’s office of the county in which such real estate is situated.”

The other errors assigned relate to matters not prejudicial, even though they may be technically erroneous, and it is not necessary to notice them more specifically.

The judgment of the trial court is in accord with the facts shown by the record and the law applicable thereto, and should be affirmed. It is so ordered.

Crow, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

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[No. 11714. Department Two. June 26, 1914.]

GEO. S. BROOKE, *Respondent*, v. JOS. H. BOYD, *Appellant*.¹

PLEADING—SPECIAL INTERROGATORIES. It is proper to refuse to require an adverse party to answer special interrogatories, under Rem. & Bal. Code, § 1226, permitting the same when material to the defense of the action, where they were immaterial in that answers would in nowise tend to support any material allegation of the answer, or where the matters inquired about were as much within the knowledge of the defendant as of the adverse party.

APPEAL—REVIEW—HARMLESS ERROR. Refusal to require answers to special interrogatories is harmless, where full and substantially accurate findings were made below, and the case is before the supreme court upon the findings made.

CONTRIBUTION—ACTIONS—DEFENSES—CONSENT TO RELEASE. It is no defense to an action for contribution for a note paid, that the other makers paid the note only after executing several renewal notes, which defendant refused to sign, where they did not consent to release the defendant, and the action was commenced after the last renewal was paid.

CORPORATIONS—STOCKHOLDERS—LIABILITY TO CONTRIBUTION. Where five stockholders became surety for their corporation, the right of contribution arises among themselves upon a payment by part of them, each being liable for one-fifth of the amount, and not according to the amount of stock held by each.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 11, 1913, upon findings in favor of the plaintiff, in an action for contribution, tried to the court. Affirmed.

R. L. Edmiston, for appellant.

Cannon, Ferris & Swan and *John M. Cannon*, for respondent.

FULLERTON, J.—This is an action for contribution. On December 14, 1906, the appellant Boyd, the respondent Brooke, the defendant Edward H. Dahm, and one Jensen and one White, constituted the board of trustees of the Verde

¹Reported in 141 Pac. 357.

Antique Marble Company, a corporation engaged in developing certain marble quarries situated in Stevens county. The corporation was then financially embarrassed, and to relieve its immediate necessities, the trustees named borrowed \$5,500 from the First National Bank of Coeur d'Alene, Idaho, executing and delivering to the bank their promissory note for that sum. This money was paid into the treasury of the corporation, and was used by it in part for development work, and in part in the payment of the corporation's obligations. At the time of the execution of the note to the Coeur d'Alene Bank, the corporation issued its note for a like amount to Jensen, as trustee for the five joint makers of the note, and assigned to Jensen, as security therefor, certain of its bonds. Subsequently the corporation became wholly insolvent, as the court found, without fault of Jensen or fault of its trustees, and failed to pay the note; the bonds, by reason of such insolvency, becoming worthless. On the maturity of the note given the Coeur d'Alene bank, the appellant refused to pay any part thereof, and refused to join with his co-makers in a renewal thereof, or to recognize the note as a binding obligation upon him in any manner whatever. Thereupon the remaining trustees, on the demand of the bank, renewed the note for a limited period, and thereafter renewed it for a second time, and finally Brooke, White and Jensen paid the same. Thereafter White and Jensen sold and assigned their claim for contribution to the respondent Brooke, and this action was thereupon instituted to recover against Boyd his proportionate share of the note.

The appellant defended the action on the ground of fraud, averring that he had been induced to join in the execution of the note through the false and fraudulent representations of his co-trustees and co-makers of the note. A reply was filed putting in issue the allegations of the answer, and the case was tried by the court sitting without a jury. The court made a specific finding to the effect that no fraud had been practiced upon the appellant, and held him liable to the re-

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spondent for one-fifth of the original amount of the note, together with interest thereon at the rate prescribed in the note, and entered judgment against him for the total of these sums.

The appellant first complains that the court erred in striking, and refusing to require the respondent to answer, certain interrogatories filed in the clerk's office pursuant to § 1226 of Rem. & Bal. Code (P. C. 81 § 1071), which permits interrogatories to be so filed when material to the defense of an action. The order of the court does not disclose the ground upon which it rested its order, but a perusal of the interrogatories shows that they were properly stricken for the greater part on the ground of immateriality, in that answers thereto would in no-wise tend to support any material allegation of the answer or affirmative defense; and that those which might be said to be material called for matters as much within the knowledge of the appellant as they were of the respondent, and were properly stricken on that ground. It is not the purpose of the statute to enable the one party to a lawsuit to require the other party thereto to supply him with all the facts and documents that may be material to his side of the case, or even to secure admissions against interest. Its purpose is to enable him to discover material facts and documents solely within the knowledge, possession, or control of the other party to which he has not access. Such facts and documents as are accessible to him he must procure from the original sources. Furthermore, the case is before us on the findings of fact made by the trial court, which the appellant says in his brief are full and substantially accurate. This being true, the appellant cannot have been prejudiced by the ruling of the court, since the only object sought by the interrogatories has been accomplished. *Du Clos v. Batcheller*, 17 Wash. 389, 49 Pac. 483.

The appellant next contends that, inasmuch as the respondent and his assignors executed a second and third note to the bank prior to paying the obligation without his join-

ing them, they in effect released him from his obligation. It may be that the bank, by accepting the renewal note without the appellant's signature and surrendering the one upon which the appellant was bound, waived its right thereafter to proceed against the appellant for the indebtedness represented by the note, but it would be a novel doctrine to hold that this act released the appellant from contributing to his co-obligors who finally paid the indebtedness. He could be released from this obligation only by their consent, and the record is clear that they did not so consent, whatever effect may be given to the action of the bank with reference to its rights. If the effect of the execution of the renewal notes was to extinguish the note upon which the appellant was bound, the renewal was a payment of the note as to him by his co-makers, and his liability to contribute arose at once. On the other hand, if such renewal was not a release of his obligation to the bank, he was finally released when the last of the renewal notes was actually paid, and his obligation to contribute to his co-makers arose at that time. Since the action against him for contribution was begun after the final payment of the renewal notes, it is not material to inquire which of the foregoing views is correct in order to determine his liability, however pertinent the inquiry might be to determine the amount thereof. But as to this last question, there is no dispute. The appellant is liable for a contribution of a full one-fifth share of the original note, and it is not claimed that he has been held in a sum exceeding that share.

The appellant next contends that the court erred in holding him liable to contribute an equal share of the indebtedness, but should have held him for such proportional share thereof as the number of shares he owned in the corporation bore to the number of shares held therein by his co-obligors. But the rule is otherwise. As stated by Mr. Thompson in his work on Corporations, vol. 5 (2d ed.), § 5233:

"Where stockholders become surety for a corporation, the right of contribution arises as among themselves, where

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the circumstances are such as would give this right among sureties in an ordinary case. Thus, where five stockholders executed a note to a corporate creditor for money loaned to the corporation, they thereby became co-sureties for it and each was liable to pay one-fifth of the whole and no more. And each was subject to the liability to make equal contribution to the one which paid the whole note at maturity without regard to the relative amount of stock owned by each."

Finally, it is argued that the record shows fraud practiced upon the appellant by which he was induced to sign the original note. This contention is founded upon certain supplemental, or additional findings, made at the request of the appellant, which show more in detail than do the original findings the relation of the makers of the note to the corporation for whose benefit the note was executed. But we cannot so read the findings. They show, undoubtedly, that the respondent and his assignors had a greater interest in the corporation than the appellant had, and were more familiar with its financial condition, but they clearly negative the idea that any fraud or deceit was practiced upon the appellant.

The judgment is affirmed.

MOUNT, PARKER, and MORRIS, JJ., concur.

[No. 11801. Department Two. June 26, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Great
Northern Railway Company, Appellant*, v. PUBLIC
SERVICE COMMISSION OF WASHINGTON *et al.*,
Respondents.¹

CARRIERS—RATES—REGULATION—ORDER OF PUBLIC SERVICE COMMISSION—WHEN TO TAKE EFFECT. Under 3 Rem. & Bal. Code, § 8626-81, providing that at the conclusion of a rate hearing before the public service commission, the commission should enter an order which shall of its own force take effect and become operative twenty days after service thereof, unless additional time is prescribed by the commission, an order of the commission fixing reasonable rates after a hearing, without fixing any time for it to become effective, takes effect and becomes operative twenty days after the service thereof.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 18, 1913, affirming an order of the public service commission directing the refund of an excessive freight rate, after a hearing before the court. Affirmed.

F. V. Brown and *F. G. Dorety*, for appellant.

The Attorney General and *Stephen V. Carey*, Assistant, for respondents.

MOUNT, J.—On December 18, 1911, the Public Service Commission of this state, upon a hearing as to the reasonableness of the freight rates on the Marcus division of the Great Northern Railway Company, made an order, "that the Great Northern Railway Company be and it is hereby ordered and required to revise and modify its tariffs applicable to the State of Washington in the following particulars, to wit:—" Then follows a description of the items and the rates of freight thereon. This order was duly served upon the rail-

¹Reported in 141 Pac. 351.

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way company upon December 22, 1911. It did not state upon its face when the rates became effective. Within twenty days after service of the order, the railway company published a tariff in accordance with the order and stated that the rates became effective to shippers on February 18, 1912.

The question involved upon this appeal is whether or not the modifications and reductions in the freight rates commanded by the order of the commission were effective at the expiration of twenty days from the service of the order, or thirty days after the expiration of the twenty-day period. The answer to this question depends upon the proper construction to be given to the statute.

Section 14 of the public service commission law, found on page 548, Laws of 1911 (3 Rem. & Bal. Code, § 8626-14), provides:

"The commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of such schedules as may be found expedient, and to modify the requirements of this section in respect to publishing, posting and filing of schedules either in particular instances or by general rule or order applicable to special or peculiar circumstances or conditions."

Section 15 (Id., § 8626-15), of the act provides:

"Unless the commission otherwise orders no change shall be made in any classification, rate, fare, charge, rule or regulation which shall have been filed and published by a common carrier in compliance with the preceding section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, classification, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission, for good cause shown, may by order allow changes in rates without requiring the thirty days' notice and the publication herein provided for."

Section 80 (Id., § 8626-80), of the act provides the manner in which complaints may be made to the public service commission, and for a hearing as to reasonableness of rates.

Section 81 (Id., § 8626-81), provides:

"At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. Where an order cannot in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order."

The order of December 18th, as above stated, did not fix any date upon which it was to take effect. It is argued by the appellant that the order is controlled by the provisions of § 15 above quoted, and that the freight rates did not become effective until thirty days after the order of the commission became effective; that the order of the commission operated upon the railway company and not upon the freight rates. We are of the opinion that the order in this case is controlled entirely by the provisions of § 81 above quoted. That section plainly states that, after a hearing upon the reasonableness of the rate the public service commission shall make an order, which order shall of its own force take effect and become operative *twenty days after the service thereof*. Section 15 provides that the commission for good cause shown may allow changes in rates without requiring the thirty days notice and publication. And § 81 provides that an order which fixes no time for becoming effective shall of its own force take effect and become operative twenty days after the service thereof. So it is plain, we think, that, under the terms of the statute, the order of the public service commission became effective at

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the expiration of twenty days after the service thereof, for the reason that no time was fixed in the order. We are of the opinion, also, that the order became effective both as to the railway company and as to the rates. The trial court so construed the statute, and in our opinion correctly.

Counsel for the appellant cite the case of *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, 207 Fed. 733. It is conceded that that case is not like this on the facts, and it is clearly distinguishable, because in that case the commission had made no enforceable order in regard to rates, and the rates published, therefore, continued to be the voluntary rates of the carrier; while in the case at bar, the public service commission made an order, mandatory in its terms, which affected the rates twenty days after the service of the order.

We are satisfied that the trial court properly construed the statute, and the judgment is therefore affirmed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11856. Department One. June 26, 1914.]

**THE CITY OF SPOKANE, *Appellant*, v. RUFUS MERRIAM *et al.*,
Respondents.¹**

EMINENT DOMAIN — BY MUNICIPAL CORPORATIONS — PROCEEDINGS — PREREQUISITES — NECESSITY OF ATTEMPTING TO AGREE. The provision of Spokane city charter, art. 5, § 49, relating to condemnations, which provides that if the park board shall be unable to purchase at a satisfactory price, any lands sought, the council shall, upon notice given by the board, condemn the same, is not a valid limitation upon the power of the city to condemn only where effort to secure the property sought by agreement has failed; in view of the general statutes, Rem. & Bal. Code, §§ 7768-7771, conferring the power of eminent domain and fixing the procedure, without any such limitation or any reference to any action by the park board or authority to delegate any part of the power to the park board.

SAME — CONDITION PRECEDENT — JURISDICTION — WAIVER OF OBJECTION. The failure to agree upon the price of land sought is not a condition precedent to the institution of condemnation proceedings, unless it is so prescribed in the act; hence a failure to allege or prove the same is not a jurisdictional defect and is waived if not raised below.

SAME — PUBLIC USE — TAKING OF LAND FOR PARK. The taking of lands for public parks, boulevards and parkways is a public use.

SAME — PROCEEDINGS — CONDITIONS PRECEDENT — PRESUMPTIONS. The statutes having entrusted to the city council the power to initiate condemnation proceedings by ordinance, in the absence of fraud the courts will presume that all antecedent executive and quasi judicial investigation prescribed by law preceded the adoption of an ordinance invoking the exercise of the power of eminent domain by a city.

SAME — PUBLIC NECESSITY. In condemning lands for park purposes, a city need not show an immediate necessity for an immediate use, but has a right to anticipate future needs.

EMINENT DOMAIN — PUBLIC NECESSITY — EVIDENCE — SUFFICIENCY. Where ordinances providing for condemnation declared that property sought to be taken was necessary for park purposes, and a recital of the facts upon which such declaration was based would not further establish its truth or good faith, in the absence of some charge of fraud, and it was further shown that the land sought was required to connect two other tracts donated to the city for park purposes and

¹Reported in 141 Pac. 358.

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which could only be retained by securing the property sought, and that the request of the park board for the condemnation had been recommended by the committee appointed by the council to investigate the same, the evidence was sufficient to show a reasonable necessity for the taking of the land for park purposes, and that the taking was sought in good faith.

SAME. Such evidence is admissible on the question of the public use and necessity for condemning the land.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 29, 1914, dismissing proceedings to condemn property for park purposes, after a trial before the court and a jury. Reversed.

H. M. Stephens, for appellant.

Post, Avery & Higgins, for respondents Merriam.

Graves, Kiser & Graves, for respondents Birch and Jones.

ELLIS, J.—This is an action to condemn land for a public park. The complaint alleges:

"That the electors of the city of Spokane have authorized a bond issue of \$875,000 for the purpose of acquiring and improving land for park purposes; that the board of park commissioners of the city of Spokane has planned as part of the park system of the city of Spokane, boulevards, parks and playgrounds located in different parts of the city of Spokane, to furnish roads, playgrounds and parks for the general public; that the property hereinafter described is part of the property determined upon by the said board of park commissioners for said park use and that it is necessary and public necessity requires to acquire the above described property for the public uses and purposes as above set forth in order to serve and accommodate the people of the city of Spokane."

Omitting other immaterial matter, it is then alleged that the city passed two ordinances numbered respectively "C1443" and "C1444," copies of which are attached to, and made a part of, the complaint. The first of these, omitting immaterial parts, is as follows:

"An ordinance providing for the condemnation for public park purposes of the following described property, compris-

ing approximately five (5) acres, more or less, situated in the city and county of Spokane, Washington, to wit: [here follow specific description of the real property which it is admitted belongs to the defendants Merriam and wife] and directing the corporation counsel to institute proceedings therefor.

"Whereas, public necessity requires that the property above described be acquired by the city of Spokane for public park purposes, now, therefore,

"The city of Spokane does ordain:

"Section 1. That the corporation counsel be and he is hereby instructed and authorized to institute proceedings for the condemnation for public park purposes of the following described property situated in the city and county of Spokane, Washington, comprising approximately five (5) acres, more or less, to wit:" [here the property sought to be taken is again specifically described.]

The other ordinance is identical with this, save that the property specifically described comprised approximately thirty-four acres and is the property admittedly belonging to Birch and wife, Charles H. Jones and wife and Melville F. Jones. The petition closes with the usual prayer in such cases. A jury was empaneled and sworn and, by agreement of counsel, visited the property sought to be taken.

The plaintiff offered in evidence the testimony of the engineer of the city park board to the effect that he had made surveys of the land involved and a map showing its relation to the city of Spokane and to other park property of the city. This map, which is in the record, shows that the two pieces of property sought to be taken, known as the Merriam property and the Birch and Jones property, form one complete tract, comprising about thirty-nine acres lying between, and forming a connecting link between, two tracts which the witness testified were lands which had been donated to the city for park purposes. Each of these donated tracts apparently contains something over forty acres. The witness also identified, as prepared by himself, a contour map of the land sought to be taken, showing that all save about

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ten acres is rough land, lying upon a hillside. Certified copies of the two ordinances attached to the petition were offered and received in evidence. Objection was made by the defendants that these ordinances were not sufficient in themselves to show a public use. The court intimated that additional proof of the public use and necessity would be required. The plaintiff thereafter sought to introduce a certified copy of the petition of the park board and the park board record, requesting the council to make the condemnation, and the deeds of donation conveying the two tracts of land on either side of the property sought to be condemned and the proceedings of the city council touching the condemnation, and called the secretary of the park board to identify the park board records for the purpose of this proof. The offer, upon objection, was rejected. The secretary of the park board identified, from the minutes of a regular meeting of the park board of July 10, 1913, a communication on behalf of the owners of the two tracts of land on either side of, and adjoining the property here sought to be taken, offering to dedicate these two tracts to the city upon the following condition:

"The above proposition is made provided the city will open to the public the thoroughfare we are herewith proposing to dedicate through section 31, and acquire title and occupy the 39 acres in the northeast quarter of the southwest quarter of said section for thoroughfare and park purposes, also to improve immediately in a good workmanlike manner this thoroughfare through section 31 by grading a road at least 20 feet wide, and our land to revert to us should the city not improve the same as a parkway and for park purposes within a reasonable time, or ever use it for any other purpose. It is our understanding that this thoroughfare is to be improved according to the tentative plans already made by the Olmsted Brothers of Boston."

Following this, was offered an order or resolution of the park board, as follows:

"On motion of Commissioner Wilson, seconded by Commissioner Geraghty, and carried by the affirmative vote of all commissioners present, excepting Commissioner Hamblen, who did not vote thereon, the matter was referred to the Acquisition Committee with power to act, and the president and secretary authorized and instructed to request the city council to condemn the entire area owned by Jones, Birch and Merriam, in said section 31, instead of a roadway through same as originally ordered."

Plaintiff also offered in evidence deeds from the parties mentioned in the foregoing offer, conveying to the city of Spokane the property therein described, namely, the two tracts of land on either side of the property sought to be taken, which deeds contain express covenants to the effect that, as a part of the consideration for the conveyance, the city of Spokane will acquire the thirty-nine acres and will improve, occupy, and forever maintain for park and thoroughfare purposes and no other, "the land so acquired and the land herein conveyed," and, as soon as the weather will permit, will grade a roadway at least twenty feet wide through the lands, and, further, that the land conveyed will be connected with the city park and parkway system, and will be improved and maintained as early as conditions in the adjacent locality will warrant. Each of the deeds contains the further covenant that, in the event of the failure of the city to comply with any of the conditions of the grant, the land conveyed shall revert to the grantor. There are four of these deeds, all containing substantially these same conditions. Certified copies of the petition presented to the city council for the condemnation and of the proceedings of the council with respect to the property involved were offered, objected to, and rejected. Two of these are communications from the park board to the mayor and city council, stating, in substance, that, at a meeting of the park board on August 14, 1918, it was ordered that the city council be requested to condemn the property here sought to be taken and describing by specific descriptions the five acres (the Merriam tract)

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and the thirty-four acres (the Birch and Jones tract) and closing with the statement that the matter had been under consideration for several years; that ordinances had been passed by the city council for condemnation through this area, and called attention to the fact that the change of description would probably require new ordinances. There was also offered a communication from the commissioner of public utilities, city engineer, and commissioner of public works to the mayor and city council, reciting that these, as a committee appointed to investigate the condemnation of land in accordance with the petition from the park board, begged to report that, after a careful investigation, they recommended the condemnation as requested. The superintendent of parks for the city of Spokane was called as a witness and the offer made to prove by him the plan of the park board for improving the two tracts of land which had been donated to the city, and in connection therewith of the property here sought to be taken, for park purposes. This evidence was also excluded.

The trial court held, in substance, that the ordinances pleaded in the petition for condemnation were insufficient to initiate the proceeding, in that they declared generally that the public interest requires that the property described be acquired by the city of Spokane for public park purposes. The court was of the opinion that the purposes of the city to use this land for park purposes and the necessity for that use could only be proved by ordinances of the city to that effect, and held that, before the city can condemn property for any purpose, whether for parks or otherwise, "it must, by appropriate ordinances, set forth the improvement or scheme *in furtherance* or execution of which the property sought to be condemned is to be used and the manner of the use to which it is to be put." The court thereupon refused to consider any of the evidence offered by the city as tending to show the purpose and necessity of the condemnation, discharged the jury, and dismissed the proceeding. The city appealed.

Two principal questions are presented for consideration: (1) Was the failure to allege and prove an effort to agree with the owners as to the compensation for the land sought to be taken a fatal defect? (2) Were the ordinances pleaded and proved sufficient, in connection with the evidence offered, *prima facie* to show a public use and necessity?

I. The statute enumerating the powers of cities of the first class, Rem. & Bal. Code, § 7507 (P. C. 77 § 83), declares that any such city shall have power:

"To acquire, by purchase or otherwise, lands for public parks within or without the limits of such city, and to improve the same."

Section 7768 (P. C. 171 § 31) declares:

"Every city of the first, second and third classes and other cities having a population of over fifteen hundred inhabitants within the state of Washington, is hereby authorized and empowered . . . to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards . . . and to condemn land and other property and damage the same for any other public use after just compensation having first been made or paid into court for the owner in the manner prescribed by this act."

Section 7769 (P. C. 171 § 33) declares:

"When the corporate authorities of any such city shall desire to condemn land or other property, or damage the same, for any purpose authorized by this act, such city shall provide therefor by ordinance, and unless such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, compensation therefor shall be made from any general funds of such city applicable thereto."

Section 7770 (P. C. 171 § 35) declares that, when any such ordinance shall have been passed by the legislative authority of a city, such city shall file a petition in the superior court in the name of the city, praying that just compensation, to be made for the property to be taken or damaged for

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the purpose specified in the ordinance, be ascertained by a jury or by the court in case a jury be waived.

Section 7771 (P. C. 171 § 37) declares:

"Such petition shall contain a copy of said ordinance, certified by the clerk under the corporate seal, a reasonably accurate description of the lots, parcels of land and property which will be taken or damaged, and the names of the owners and occupants thereof and of persons having any interest therein, so far as known, to the officer filing the petition or appearing from the records in the office of the county auditor."

Then follow provisions for service of summons, trial and judgment.

It will be noted that these statutory provisions conferring the power of eminent domain and prescribing the mode of its exercise by cities do not require an antecedent attempt to agree with the owner for the purchase of the land sought to be taken either as a jurisdictional prerequisite or otherwise.

The charter of the city of Spokane (article 5, § 48) authorizes the park board of that city to lay out and establish parks, and purchase or accept land for that purpose, and confers the management and control of all parks and grounds used for park purposes and connecting boulevards and parkways owned or controlled by the city upon the park board. It declares that all property acquired by the park board shall be in the name of the city. Section 49 of the same article relates to condemnation of land for park purposes and, so far as here material, provides:

"(a) If the board shall be unable to purchase at a satisfactory price any lands or other property for park purposes or be unable to make a satisfactory arrangement as to compensation, the council, upon notice given by the board, shall condemn the same at the expense of the park fund."

It is upon this provision of the city charter that the respondents base their claim that the effort to agree with the owners is a jurisdictional prerequisite to condemnation by the city. It is argued that, because the original act of 1890,

Laws 1890, p. 215, *et seq.*, empowered cities of the first class to adopt charters for their own government, and the act of 1911, Laws of 1911, page 54 (§ Rem. & Bal. Code, §7493-1), confers upon cities of the first class the power to determine by their charters the form of organization and manner and mode of exercising their powers and functions, therefore, the foregoing provisions of the city charter have all the force of a general law as applied to the city of Spokane, and import into the general law relating to condemnation a limitation of the city's power to condemn to cases where the effort to secure the property sought by agreement has failed. We find no merit in this contention. Neither of the statutes conferring upon cities of the first class the power to adopt charters for their own government has conferred upon such cities the power to provide a procedure for the exercise of the right of eminent domain. *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847. The power of eminent domain has never been conferred by the state upon the park board, nor has the state ever authorized the city to delegate to the park board the power to say, by resolution or otherwise, when, how, or upon what conditions the city may exercise the power of eminent domain for park purposes or other purposes. The power having been conferred upon the city for the public good and the manner of its exercise having been prescribed by the statutes above outlined (Rem. & Bal. Code, §§ 7768 *et seq.*; P. C. 171 § 31), the city cannot prescribe by charter or otherwise, as a jurisdictional prerequisite to its exercise of that power, any action of the park board. This comes from the sovereign nature of the power of eminent domain. It is a part of the state's sovereign power which cannot be delegated even by the legislature except by express grant or by necessary implication; never by mere argumentative inference. *State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913 E. 1076; *Lewis, Eminent Domain* (3d ed.), § 371.

The requirement that the park board shall attempt to pur-

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chase before asking the city to condemn, which is at most only implied by the above charter provision, is a mere administrative detail the failure to observe which in no manner affected the city's power to condemn. It may be conceded that, where the duty to attempt to agree with the owner is imposed by the statute conferring the right to condemn, and prescribing the mode of its exercise, the failure to make the attempt will be fatal to the proceeding. *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217. But where the statute conferring the power and prescribing the proceedings for its exercise does not make the effort to agree a condition precedent to the exercise of the right of condemnation, the failure to show that such an attempt was made will not be fatal. *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269; *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 Pac. 423, 125 Am. St. 927, 17 L. R. A. (N. S.) 1005. This court has held, even where the statute delegated the power of eminent domain to cities for the straightening of water courses (Bal. Code, § 944; Rem. & Bal. Code § 7690; P. C. 77 § 337), when "the city council cannot agree with the owner thereof as to the price to be paid" that the effort to agree is not a condition precedent to the right to condemn, since not so prescribed in the act of 1905, which, as amended, constitutes Rem. & Bal. Code § 7768 *et seq.* (P. C. 171 § 31), furnishing the procedure for the condemnation. In *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215, this court, speaking through Judge Rudkin, said:

"While it is true that § 944 only authorizes condemnation after failure to agree, yet, the right or power to condemn is conferred by that section, and the procedure is regulated by the act of 1905, *supra*, under which the proceedings in question were instituted. The latter act authorizes proceedings under it 'to condemn land and other property and damage the same for any other public use within the authority of such city after just compensation having been first made or

paid into court for the owner in the manner prescribed by this act; and the failure of the parties to agree on the price is not a condition precedent to the institution of proceedings under this act."

See, also, to the same effect, *State ex rel. Jones v. Superior Court*, 44 Wash. 476, 87 Pac. 521. The foregoing authorities are decisive of the question under discussion. It may be conceded that the provisions of the city charter above referred to have as great force as if contained in an act of the legislature. It will hardly be claimed that they have greater force than such an act, but, as shown by the foregoing decisions, even an act of the legislature containing the same inferential direction for an attempt to agree with the owner is not a jurisdictional prerequisite to the condemnation when not found in the act prescribing the procedure for condemnation as a condition precedent. Moreover, it is admitted that this question was in no manner raised or passed upon in the lower court. This being a mere administrative detail imposed by the charter, and not a condition of the grant of the power from the state, it is not a jurisdictional prerequisite to the maintenance of the action. At most, the failure to observe it was a mere irregularity. It was waived by the failure to object in the court below.

II. Were the ordinances pleaded and the evidence offered by the city sufficient *prima facie* to show a public use and necessity for the taking? It is, of course, conceded that the taking of lands for public parks, boulevards and parkways is a public use. 4 McQuillan, *Municipal Corporations*, § 1486. The power of the city to take lands by condemnation for these purposes is conferred by the same statute and the city is authorized to exercise the power in the same way and by the same procedure as in the taking of lands for public streets. Rem. & Bal. Code, § 7768 *et seq.* (P. C. 171 § 81). It is the established law of this state, as declared by repeated decisions, that when a city has jurisdiction to take lands for public streets, "the determination of the questions

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of public use and public necessity by the proper municipal officers is conclusive upon the courts in the absence of fraud." *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827; *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940. The respondents concede that "the same rule holds good, of course, with respect to parks." This is undoubtedly true. But it is argued that "the statutes do not purport to prescribe by what municipal authorities the granted powers shall be exercised," and, therefore, under the above mentioned provisions of the city charter, they must be exercised by the park board. In this counsel are in error. The right of eminent domain is expressly conferred upon the city as a corporate entity. (Rem. & Bal. Code § 7768; P. C. 171 § 31). The procedure for exercise of that power is particularly prescribed.

"When the corporate authorities of any such city shall desire to condemn land . . . such city shall provide therefor by ordinance," etc. (Rem. & Bal. Code, § 7769; P. C. 171 § 33).

and again:

"Whenever any such ordinance shall be passed by the legislative authority of any city for the making of any improvement authorized by this act . . . which will require that property be taken or damaged for public use, such city shall file a petition," etc. (Rem. & Bal. Code, § 7770; P. C. 171 § 35).

and again:

"Such petition shall contain a copy of said ordinance," etc. (§ 7771; P. C. 171 § 37).

It is obvious, from these provisions, that no matter what administrative officer or board is entrusted by the city with the purchase of lands for, and the laying out, management, and control of, its streets, parks and boulevards, it is only the city as a corporate entity, and only through its legislative authority *by ordinance*, that can finally declare what property is necessary to be taken by condemnation for any of these purposes. It matters not that the council's deter-

mination is, under the city charter, based exclusively upon the requirements and notice of the park board, in case of land to be taken for public parks, it is none the less the corporate action of the city as a corporate entity, and through the *legislative authority of the city*, and *by ordinance*, that, under the statute, makes that final determination of the question of public necessity which, in the absence of fraud, is conclusive upon the courts.

"When the taking is by a municipal corporation, it usually must be authorized by a vote of the governing body, and this must be passed in such manner and by such formalities as are required by law. No general rule can be laid down, except that the statute must be strictly complied with." 2 Lewis, Eminent Domain (3d ed.), § 506.

In the absence of any allegation or proof of fraud, the courts will presume that this, the most formal, solemn and authoritative declaration of which the corporate entity is capable, was based upon all of the antecedent executive, administrative and quasi-judicial investigation, consideration and determination prescribed by the charter or by law. It is this final corporate declaration, the ordinance, which alone is required by the state in prescribing the procedure, to be set out in the petition invoking and setting in motion the exercise of the power of eminent domain by the city. *State ex rel. Kent Lumber Co. v. Superior Court*, 35 Wash. 303, 77 Pac. 382.

The ordinances here in question found and declared the ultimate fact with which alone the court was concerned, namely, that the property sought to be taken was necessary for public park purposes. Neither the truth nor the good faith of this declaration would have been added to, or more conclusively established, in the absence of some charge of fraud, by a recital in the ordinance of all of the evidential facts upon which it was based. Even had fraud been charged, the evidence offered was sufficient to negative that charge. It showed that the land sought was required to connect two

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other tracts of land which had been donated to the city for park purposes, and which could only be retained by securing the property here sought for use and improvement in connection therewith. It showed that the park board, with its request for the condemnation, had reported to the city council the facts of which the park board was possessed as to the necessity of this land for park purposes. These offers were from the files and records of the park board, duly identified. They were clearly admissible. *Nickeus v. Lewis County*, 28 Wash. 125, 62 Pac. 763. The offers showed that a committee appointed by the city council, consisting of the commissioner of public works, the city engineer, and the commissioner of public utilities, had carefully investigated and reported to the city council, recommending that the request of the park board be granted. This offer was from the files of the city clerk. All of this evidence was admissible, though not in terms referred to in the ordinances for condemnation. *In re Queen Anne Boulevard*, 77 Wash. 91, 137 Pac. 435. The evidence offered was ample to show a reasonable necessity for the use of this land for park purposes within a reasonable time, and that the taking was sought in good faith to meet that necessity. A reasonable necessity, not an absolute necessity, is all that is required in any case. A recital of all of these things in the ordinances would not have dispensed with their proof in the face of a charge of fraud. The recital in the ordinances would not have added to its presumed verity in the absence of such charge.

We have examined authorities cited in this connection from other jurisdictions, but deem it unnecessary to review them, since we conceive that our own statute and our own decisions are decisive of the sufficiency of the ordinance and of the offered evidence to establish the public use and necessity.

It was not incumbent upon the city to show an immediate necessity for an immediate use. The showing of a reasonable necessity for use in a reasonable time is all that can be required. A municipal corporation has the same right to be

provident and forehanded in the acquirement of property for a public use that a public service corporation has. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199. We have recently held that a railroad company may condemn for terminals in anticipation of its needs for a term of years. *Neitzel v. Spokane International R. Co.*, ante p. 30, 141 Pac. 186. See, also, *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591. We know of no reason why a less liberal rule should be enforced against the city.

The judgment is reversed, and the cause is remanded for further proceeding in accordance with the views here expressed.

CROW, C. J., MAIN, CHADWICK, and GOSE, JJ., concur.

[No. 11876. Department Two. June 26, 1914.]

L. S. AGNEW, *Respondent*, v. J. M. HACKETT, *Appellant*.¹

FRAUD—FALSE REPRESENTATIONS—ACTIONS—DEFENSES. False representations of material facts whereby a party was induced to sign a note are actionable, whether the party making them knew them to be false or not.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Upon an issue as to fraud by making false representations, instructions as a whole are not prejudicially erroneous, where the jury were told plaintiff could not recover (1) if she *knowingly* made false representations, or (2) if she knew her representations were false when she made them, or (3) if she made them recklessly, or (4) if she made false representations without any knowledge of their truth; especially where the issue was sharply defined as to whether she made any representations whatever, and the jury determined such issue in her favor.

NEW TRIAL—MISCONDUCT OF PARTY. A new trial will not be granted for misconduct of a party in charging a witness with giving false testimony, where the showing was not sufficient.

¹Reported in 141 Pac. 319.

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Appeal from a judgment of the superior court for Chehalis county, Irwin J., entered June 24, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

John C. Hogan and *A. E. Graham*, for appellant.

Bridges & Bruener, for respondent.

MORRIS, J.—In an action upon a promissory note for \$1,000, the maker, appellant here, defended upon the ground that the note was given as part of the purchase price of an automobile business which appellant was induced to purchase because of false representations, made by respondent and her husband, now deceased, as to the assets and liabilities of the business. This plea was met by a general denial, and the issue thus framed was submitted to a jury, who found for the plaintiff. Error is alleged in the giving and refusal of instructions and the misconduct of plaintiff during the trial.

The first instruction attacked is:

"(2) If you believe from a preponderance of the evidence in the case that this note was given in part payment of the purchase price of the stock, and that the plaintiff at the time the defendant purchased the stock *knowingly* made false statements in relation to the financial condition of the company and as to its assets and liabilities, and that Mr. Hackett relied upon those statements, believing them to be true, and was induced thereby to purchase the stock, and that the stock was not of the value represented by the plaintiff and was not of any value, then defendant would not be liable upon the note and the plaintiff could not recover. But if you believe that no false or fraudulent representations were made with intent to deceive the defendant as to the actual value of the stock, and he purchased the stock, giving this note in part payment therefor, then he would be liable and plaintiff should recover."

The second is:

"(4) If you believe from a preponderance of the evidence that the plaintiff made material representations to the

- defendant, either by conduct or orally or by writing, with reference to the business and financial standing of the company, and that the representations so made were false and that the plaintiff *knew they were false when she made them, or made them recklessly or without any knowledge of their truth*, and that she made them with the intent that they should be acted upon by the defendant, and that the defendant actually did rely upon them, and you are satisfied the stock was worthless when it was purchased by the defendant, then the plaintiff cannot recover."

The second instruction, in saying that recovery is conditioned upon the plaintiff *knowingly* making false statements in relation to the financial condition of the company, is not a correct statement of the law. In cases of this character, liability is determined, not only by a statement of that which is known to be false; but false representations of material facts made to induce a party to act, and relying upon the truth of which he does act to his detriment, are actionable, whether the party making the false statements knew them to be false or not. The fourth instruction also incorrectly states the rule when it says that not only must the representations be false, but that "plaintiff knew they were false when she made them, or made them recklessly." This instruction also says that plaintiff would be liable if she made false representations "without any knowledge of their truth." This last statement would fall within the correct rule of liability, that misrepresentations of material facts are actionable whether known to be false or made without knowing whether they were false or true; for the jury, we think, would get the same idea from it as if the lower court had said "not knowing them to be true or false." Reading these instructions together, then, we find that the jury are told the plaintiff could not recover, (1) if she knowingly made false representations, or (2) if she knew her representations were false when she made them, or (3) if she made false representations recklessly, or (4) if she made false representations without any knowledge of their truth. It would hardly be doubted that any of

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these findings would sustain a liability for fraud, and that is what the jury are in effect told. Not that they must find that plaintiff knowingly made false statements, but it is sufficient if they find that she made false statements "without any knowledge of their truth." That this was the meaning intended to be conveyed to the jury, and the only one they would get from the charge as a whole, is apparent by referring to instruction No. 6, where plaintiff's liability is made to depend upon whether she "misrepresented" the financial condition to the defendant. This would include any misrepresentation, both that which was known to be false and that which was made without knowing whether it was true or false.

We are moved to our conclusion by another consideration. The issue in this case, as made by the affirmative answer and reply, was not the extent or character of the statements made by the respondent to appellant, but whether she made any statement at all to him. He testified she represented the company in making the sale and made certain statements as to its financial condition; while she testified she had no dealing at all with appellant, never talked with him about the sale, and did not know that he was interested in the sale until the deal was closed. The jury determined by the verdict that respondent spoke the truth, and that she made no statements of any kind to appellant relative to the matter. In view of this situation, it would appear like straining at gnats for the court to now reverse this judgment because the lower court, in one view of his instructions, made an erroneous statement of the law relative to the proper rule for measuring statements which the jury have found were never made, so that they never had any occasion to use the incorrect rule given them by the court. The refused instructions upon which error is predicated referred to the measure of damages in computing the amount appellant would be entitled to recover, if at all. In view of the verdict, we find no error in refusing these instructions.

The misconduct of respondent was based upon what she is alleged to have said to one of appellant's witnesses in the presence of the jury as they were retiring to the jury room, charging him with giving false testimony. It does not appear to us that the showing is sufficient to warrant a disturbance of the judgment, and it is affirmed.

CROW, C. J., PARKER, and MOUNT, JJ., concur.

[No. 11576. Department One. June 27, 1914.]

CHARLES E. BURNLEY, *Appellant*, v. ROBERT C. SHINN,
Respondent.¹

SALES—RESCISSION—BY PURCHASER. There can be no rescission by the purchaser of an automobile, seeking to recover the purchase price because of fraud in the sale, where it was badly damaged while in his possession, so that the parties cannot be placed in *statu quo*.

SALES—WARRANTY—DAMAGES—MEASURE. There can be no recovery of damages for breach of warranty of an automobile, in the absence of evidence showing either its market or reasonable value.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 11, 1913, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Churchill & Davis, for appellant.

John P. Hartman and *Arthur E. Nafe*, for respondent.

MAIN, J.—This is an appeal by the plaintiff from a judgment of the superior court entered in favor of the defendant, Robert C. Shinn.

On the 17th day of July, 1912, the respondent, doing business as "Kent Motor Car Company," sold and delivered to the appellant a second hand "Tourist" automobile, for the agreed price of \$300. Of the purchase price, \$50 was paid

¹Reported in 141 Pac. 326.

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in cash, and two notes for \$125 each given for the balance. Subsequently the notes were endorsed and sold to the State Bank of Kent, Washington. At the time of the sale, the appellant testifies that the automobile was represented to him to be "in first-class order." The respondent admits that it was represented to be "in good condition." After taking possession of the automobile, the appellant experienced much trouble in its operation. On the 20th day of August, 1912, the machine, in a badly damaged condition, was returned to the garage operated by the respondent. The appellant then wrote a letter to the respondent stating that he should put the car in order so as to pass an expert and that the appellant would pay for the damage done to the woodwork. The car had been damaged while being towed in from some distance out in the country. At the time, the respondent's son was guiding the car, and while looking back in an effort to get his coat from the rear seat, the car ran into a ditch and was turned over.

The appellant, in his proposed findings presented to the superior court, recognized his responsibility for this damage. On the 17th day of November, 1912, this action was instituted for the purpose of recovering the sum of \$300, the amount of the purchase price, together with interest. After the issues were formed, the cause was tried to the court without a jury. Judgment was entered in favor of the respondent for repairs and storage, amounting to \$33.35, from which the appeal is prosecuted.

The action was originally brought against both Robert C. Shinn and W. J. Shinn, but at the conclusion of the appellant's testimony a nonsuit was granted as to the latter, to which there appears to be no objection.

The appellant claims that the car was warranted to him to be in first-class condition, and that there was a breach of this warranty. From the complaint, it is not clear whether the action is one for damages for breach of warranty, or for the recovery of the purchase price based upon a rescission.

In the trial court, both parties seem to have proceeded upon the theory of a rescission. For the purposes of this opinion, it will be assumed, but not decided, (a) that there was a warranty as to the condition of the car; (b) that there was a breach of the same; and (c) that, even in an executed contract for the sale of a specific chattel, a rescission can be had for a breach of warranty even though unaccompanied by fraud or an agreement to rescind. A rescission cannot be had where the property, while in the possession of the purchaser, has been damaged to such an extent that the parties cannot be placed in *statu quo*. 2 Mechem, Sales, § 1805; 35 Cyc. 440; *Bradley v. Palen*, 78 Iowa 126, 42 N. W. 623. Under the facts in this case, no rescission could be had, even if it be conceded that the evidence shows such an attempt. The car at the time of its return to the garage of the respondent had been greatly damaged through a fault chargeable to the appellant.

But if the action may be considered one for damages for a breach of the warranty, no different result would follow. The purchase price of the car was \$300. If it were not worth this sum, obviously it was of some value. There is no evidence showing either market or reasonable value, in the absence of which there would be nothing to sustain a judgment for damages.

We think, also, that the evidence fairly sustains the judgment entered in favor of the respondent for repairs and storage.

The judgment will therefore be affirmed.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

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[No. 11634. Department One. June 27, 1914.]

GRANITE FALLS STATE BANK, *Appellant*, v. T. RYAN *et al.*,
Respondents.¹

APPEAL — PRESERVATION OF GROUNDS — EXCEPTIONS TO FINDINGS. One general exception to several separately stated findings is insufficient to obtain a review of the evidence, and only presents the question whether the findings support the judgment.

Appeal from a judgment of the superior court for King county, Humphries, J., entered June 7, 1913, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Cicero R. Hawkins and Isaac R. Spilman, for appellant.

Gill, Hoyt & Frye, for respondents.

MAIN, J.—The purpose of this action was to recover the purchase price of a carload of granite paving blocks. The cause was tried to the court without a jury. Judgment was entered for the defendants in the sum of \$151.60. The plaintiff appeals.

The respondents object to our considering the evidence as contained in the statement of facts because it is claimed that no proper exceptions were taken by the appellant to the findings of fact made by the trial court. The findings are separately stated and numbered from 1 to 7 inclusive, some of which are undoubtedly correct, even from the view point of the appellant. Only a general exception was taken to all the findings. In numerous decisions of this court, it has been held that, where the trial court makes findings of fact and those are separately stated, numbered, and entered, specific exceptions thereto must be taken in order that the court may know what ones are claimed to be erroneous and on what particular points it is desired that the evidence shall be re-

¹Reported in 141 Pac. 354.

viewed. In *Peters v. Lewis*, 38 Wash. 617, 74 Pac. 815, the court, considering exceptions to findings in substantially the same general language as are those in the present case, held that they were equivalent to no exceptions, and that the evidence could not be reviewed on appeal. See, also, to the same effect: *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605; *Horrell v. California etc. Ass'n.*, 40 Wash. 531, 82 Pac. 889; *Pederson v. Ullrich*, 50 Wash. 211, 96 Pac. 1044; *Crowe & Co. v. Brandt*, 50 Wash. 499, 97 Pac. 503; *Warehime v. Schweitzer*, 51 Wash. 299, 98 Pac. 747; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026; *Snohomish River Boom Co. v. Great Northern R. Co.*, 57 Wash. 693, 107 Pac. 848; *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73.

In support of the sufficiency of the exceptions, the appellant relies upon the cases which support the rule that, where exceptions are taken to each finding by number, that they are sufficient. But the present case does not fall within that rule. Here there was but a general exception to all the findings, and not a specific exception to each.

Since the exceptions are not sufficient to permit a review of the evidence, but one question can be considered, that is, whether the findings as made support the judgment. Without considering these in detail, it may be said that a careful consideration of them leads to the conclusion that they are sufficient to sustain the judgment.

The judgment will be affirmed.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 11724. Department One. June 27, 1914.]

SIMPSON LOGGING COMPANY, *Respondent*, v. CHEHALIS
COUNTY, *Appellant*.¹

TAXATION—ASSESSMENT—EQUALIZATION—REVIEW. The acts of the board of equalization being of a quasi judicial nature, its findings will not be disturbed in the absence of a showing of fraud, or that its action was arbitrary or capricious.

SAME. Where the valuation of property adopted by the board of equalization for the purposes of taxation is so grossly excessive as to constitute actual fraud, the court has jurisdiction to review the assessment in a proper proceeding.

TAXATION—ASSESSMENT—EXCESSIVENESS—CONSTRUCTION—FRAUD. Where a county cruise of timber for the purposes of assessment was unsatisfactory, and upon objection to the board of equalization, a new cruise was agreed upon and made by a cruiser selected by the county, showing one-fourth less timber than the first cruise, the assessment of the timber upon the basis of the first cruise is constructively fraudulent, when taken in connection with the surrounding circumstances.

PLEADING—TENDER—ADMISSIONS. A tender of a tax is admitted where a complaint alleges the tender and that it was wrongfully refused, and the answer admits the tender but denies that it was wrongfully refused, as the denial was of a mere conclusion and presents no issue.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS BELOW. In the absence of a motion to retax the costs below or to strike the cost bill, error cannot be urged in taxing the costs.

Appeal from a judgment of the superior court for Chehalis county, Clifford, J., entered August 22, 1913, upon findings in favor of the plaintiff, in an action to secure a reduction of a tax. Affirmed.

J. E. Stewart, A. Emerson Cross, O. M. Nelson, and W. E. Campbell, for appellant.

W. H. Abel (Chas. F. Munday, of counsel), for respondent.

¹Reported in 141 Pac. 344.

MAIN, J.—The purpose of this action was to require the defendant, Chehalis county, to accept, as taxes upon certain timber lands of the plaintiff, a less amount than appeared upon the tax rolls as the amount of the taxes for the year 1912, and to cancel the excess.

During the years 1911 and 1912, Chehalis county caused all the timber lands within its boundaries to be cruised for the purpose of ascertaining the quantity of merchantable timber thereon. For the purpose of accomplishing this result, a chief cruiser was employed by the county, who in turn appointed assistant cruisers. The assistants worked under instructions from the chief cruiser, and their work was approved by him. The plaintiff, at the time, owned a large number of acres of timber land situated in the county. These were covered by the cruise. In the year 1902, a fire swept through certain of the sections owned by the plaintiff and burnt a large portion of the timber thereon. There were approximately eight sections affected by the fire. These were covered by the cruise made by one of the assistant cruisers by the name of Morarity, and will hereafter be referred to as the Morarity cruise. After the cruise had been made, the county assessor adopted it as the basis upon which to predicate the assessment.

When the county board of equalization met pursuant to the statute, during the year 1912, the plaintiff, together with others, presented protests, claiming either that the quantity of timber shown by the cruises and adopted by the assessor was excessive in amount, or that the valuation was too high. The plaintiff claimed that the cruise on the eight sections of land which had been burned over showed a greater quantity of merchantable timber than actually existed upon the land. The matter was considered by the board of equalization and negotiations had between it and the owner relative to devising some plan or scheme whereby a subsequent verification of the cruise might be made. The board finally concluded that, its sessions being limited to a period of three weeks'

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time, and in its opinion it being doubtful whether it had a right to incur the expense, the board as such could not attempt to make a recruise of the timber in question.

The evidence is not very definite, yet it is sufficient to show that the board, while not entirely satisfied with the Morarity cruise, yet sustained it because, as one of them testified, they did not know whether it was right or wrong, and concluded that it should be sustained until it was shown to be not right. There was no formal record made, but the evidence clearly shows that there was an understanding, more or less definite, had between the members of the board and the plaintiff, that, after the adjournment of the board, the county commissioners would, together with the logging company, make a new cruise of the land, and, if that showed that the former cruise was not accurate, an adjustment would be made in accordance with such second cruise.

It is unnecessary to more than call attention to the fact that, under the statute, the board of equalization consists of the treasurer, assessor, and the county commissioners. The county was to select the cruiser for the subsequent cruise, and the expense thereof was to be borne equally by the county and the Simpson Logging Company. After the adjournment of the board of equalization, application was made to the board of county commissioners for a new cruise. This board thereupon appointed one Noble to recruise the land in controversy. The plaintiff had no voice in making this appointment and Noble was a stranger to it. Thereafter Noble proceeded to cruise the timber upon the eight sections of land about which there was a dispute as to the quantity of timber. This cruise showed that there was a little more than one hundred million feet less of merchantable timber upon these particular sections than was shown by the Morarity cruise, or substantially one-fourth. The amount of the tax based upon the Noble cruise was \$5,778.95. While the amount of the tax based upon the Morarity cruise which was adopted by the board of equalization would be \$7,644.23.

The plaintiff tendered to the county treasurer the amount of tax for which it would be liable, based upon the Noble cruise, and thereafter instituted the present action for the purpose of compelling the county to accept the Noble cruise as a basis upon which to compute the tax. The cause was tried to the court without a jury. Judgment was entered sustaining the contentions of the plaintiff. The defendant has appealed.

In this case, no question is presented involving the value placed upon the timber by the board of equalization, but the only question is as to the quantity of merchantable timber upon the sections which had been burned over. For the purposes of this opinion, it will be assumed, but not decided, that, when the question is one of quantity, the same rules of law apply as when the controversy is over the value, in determining the right or power of the court to review an assessment as equalized by the board of equalization. The general rule is that, since the board of equalization acts in a quasi judicial capacity, its findings will not be disturbed in the absence of a showing that its action was arbitrary, capricious, or that there was fraud, either actual or constructive. *Olympia Water Works v. Gelbach*, 16 Wash. 482, 48 Pac. 251; *Edison Elec. Ill. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132; *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553; *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, Ann. Cas. 1912 B. 870.

We must, then, determine whether the action of the board was arbitrary, capricious, or fraudulent. There is nothing from which it can be concluded that the action was either arbitrary or capricious. It acted upon the only light that it then had and which, within the limited period it was permitted to remain in session, it could obtain. It has been held repeatedly by this court that the value of property for the purposes of taxation as equalized or adopted by the board of equalization may be so grossly in excess of the actual value

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as to constitute constructive fraud. In such a case, the court has jurisdiction to review the assessment in a proper proceeding. *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480; *Dickson v. Kittitas County*, 42 Wash. 429, 84 Pac. 855; *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617; *Case v. San Juan County*, 59 Wash. 222, 109 Pac. 809.

The trial court, after hearing the evidence, concluded that the Noble cruise must be sustained as showing the quantity of merchantable timber upon the land. Without reviewing the evidence, it may be said that a careful consideration of the testimony convinces us that this conclusion must be sustained. It is not claimed that either the understanding with the members of the equalization board or the board of county commissioners amounted to a legally binding obligation. But the question is whether, independent of any legally enforceable obligation by which the second cruise was to be adopted, the difference between the two cruises was such, when taken into consideration with the surrounding circumstances and facts, as to constitute constructive fraud. As already stated, the Morarity cruise showed approximately one hundred million feet more of merchantable timber than did the Noble cruise, or an excess of one-fourth. In connection with this fact, it must be noted that the board of equalization were not entirely satisfied with the Morarity cruise, but adopted it with some doubt as to its correctness; that the members of this board had some understanding that the county commissioners would, together with the logging company, make a new cruise of the land; that the second cruise was actually made by a cruiser selected by the board of county commissioners; and that the respondent paid one-half the expense thereof. Considering the discrepancy between the two cruises and the attendant facts and circumstances, it seems reasonably plain that the case is brought within the rule of constructive fraud, and, therefore, the action might properly be maintained.

It is argued that the respondent's tender was a conditional one, and for that reason this action should fail. Apparently

this point was not raised in the trial court, but is argued here for the first time. We find no merit in the contention that the tender was conditional. But in any event, that question is not open here for review. The complaint alleged a tender in full payment of the taxes for the year 1912 to the county treasurer; that the tender was wrongfully refused, and "now tenders said amount into court." The answer admits the tender, but denies that "it was wrongfully refused." The allegation that the tender was wrongfully refused was a mere conclusion of the pleader. Its denial presents no issue.

Finally, it is claimed that the court erred in taxing the costs of the proceeding to the county. The respondent prepared, served, and filed a cost bill within the time and in accord with the provisions of the statute. No motion or other application was made by the appellant either to retax the costs or to strike the cost bill. The trial court was given no opportunity to pass upon this question. There being no application made to the trial court to retax the costs, the question will not here be considered.

Finding no error in the record, the judgment will be affirmed.

CROW, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

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Opinion Per MORRIS, J.

[No. 11810. Department Two. June 27, 1914.]

JOSIAH COLLINS, *Appellant*, v. KING COUNTY *et al.*,
Respondents.¹

TAXATION—ASSESSMENTS—EXCESSIVENESS—COMPLAINT—SUFFICIENCY. A complaint to secure a reduction of taxes upon city property, alleging that the same was assessed more proportionately than other business property upon another street, is insufficient where it does not allege that the valuation is in excess of the reasonable cash value of the property, nor that the same is assessed more than like property in the immediate vicinity upon the same street.

TAXATION—REDUCTION OF TAX—FRAUD. There is no such disparity between the actual and assessed value of property as to give a right to a reduction of taxes on the ground of fraud, where appellant alleged the value fixed by the assessor to be \$33,712, but that the actual value did not exceed \$30,000; since the courts will not interfere to correct errors in judgment as to valuation, in the absence of evidence of fraud.

Appeal from a judgment of the superior court for King county, Smith, J., entered August 21, 1913, dismissing an action to secure a reduction of taxes, upon sustaining a demurrer to the complaint. Affirmed.

Hastings & Stedman, for appellant.

Samuel Morrison and *John F. Murphy*, for respondents.

MORRIS, J.—The lower court sustained a demurrer to the appellant's complaint in which he sought a reduction of taxes for the year 1912, and he appeals.

The only question here is the sufficiency of the complaint, which alleges, that the appellant is the owner of a certain lot improved with a two-story and basement reinforced concrete building, fronting upon Second avenue south, Seattle; that the county assessor, following an established custom of valuing real property for assessment purposes, had fixed the reasonable cash value of appellant's property, exclusive of im-

¹Reported in 141 Pac. 305.

provements, at the sum of \$90,000 for the year 1911, and the assessed value at \$40,500; that for the year 1912 the assessor had increased the reasonable cash value of the same property to the sum of \$120,000, and the assessable value to the sum of \$54,000; that, for the same year, the reasonable cash value of the building had been fixed by the assessor at the sum of \$33,712, and the assessed value at the sum of \$15,170; when, as a matter of fact, the reasonable cash value of the building did not exceed the sum of \$30,000, and the assessed value the sum of \$13,500; that the reasonable rental value of the ground floor of the building during the year 1912 was the sum of \$6,000, which is not more than twenty-five per cent of the rental income of property on Second avenue between Pike street and Yesler way in the same city; that the value fixed by the assessor for 1912 upon appellant's property is about fifty-four per cent of the values placed upon other properties fronting on Second avenue between Pike street and Yesler way, which properties are the most valuable properties in the city of Seattle; that the result of the assessor's act in raising the assessment for the year 1912 is to consume forty per cent of the gross rental value of appellant's property, while the assessment upon the properties on Second avenue between Pike street and Yesler way consumes but twenty-five per cent of the rental income of the first floors of the buildings so located. Then follows an allegation that the appellant's property is inequitably and excessively assessed, and that the assessor acted arbitrarily in raising the values in 1912. The last allegation is, of course, the legal conclusion of the pleader, based upon the facts preceding it.

The complaint does not show that the assessment is not uniform or proportionate to the assessment of adjacent property, nor that, as compared with such property, the assessor has capriciously or arbitrarily determined the real and assessed value of appellant's property. Neither does it allege that the valuation of \$120,000 as made up in 1912 is not

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the reasonable cash value of the property. It is not a sufficient showing of arbitrariness or fraud to compare appellant's property below Yesler way with the properties between Pike street and Yesler way, as to their rental values or the relation between their rental income and assessed valuation. Many proper considerations might determine the rental value of property on Second avenue between Yesler way and Pike street that do not enter into the rental value of property on Second avenue south, and the showing of such values of such properties is not a showing of actual or constructive fraud. We have held in *Case v. San Juan County*, 59 Wash. 222, 109 Pac. 809, and other cases, that, where there is a great disparity between the actual and assessed value, it is evidence of constructive fraud. But it does not seem to us that this rule is properly applicable here under appellant's allegation that the assessor fixed the value of his building at \$33,712, when its actual value did not exceed \$30,000.

It was early held by this court in *Andrews v. King County*, 1 Wash. 46, 23 Pac. 409, 22 Am. St. 136, that courts of equity will not interfere to correct errors in judgment as to valuation, as "value is a matter of opinion, and when the law has provided officers upon whom the duty is imposed to make the valuation, it is the opinion of those officers to which the interests of the parties are referred." And before it can be held that the valuation of the proper assessing officer is not conclusive, there must be some showing that the assessment is not the exercise of the assessor's judgment, but is the result of a rule or system of valuation designed to operate unequally and to violate the fundamental principles upon which such assessment should be based. This may be done by either showing fraud and arbitrariness in fact, or by alleging conduct on the part of the assessor the effect of which would be fraud in law. When the assessor takes the property of any taxpayer and gives to it a value much greater in proportion to its real value than other like property of other taxpayers, such act is of itself fraud in law; but there is no showing in

this complaint that such an act has been done. The complaint makes no attempt to compare the assessment of appellant with the assessment of other like property similarly situated, but makes its only comparison between the rental and assessed value of appellant's property on Second avenue south and the rental and assessed value of property on Second avenue between Pike street and Yesler way, which is not like property similarly situated.

The complaint, in our opinion, fails to state a cause of action, and the judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11912. Department Two. June 27, 1914.]

T. A. STEPHENS *et al.*, *Appellants*, v. CHEHALIS NATIONAL BANK, *Respondent*.¹

BANKS AND BANKING—DEPOSITS—SPECIAL DEPOSITS—CONDITION—LIABILITY. Where a loan was negotiated with the understanding that the money, when deposited in the bank, was to be used only in payment of specified bills of the mortgagor and of bills against the building on the mortgaged premises, and the bank notified the mortgagor of the special features of the deposit, which was acquiesced in after some dissent, the deposit was a special one and the bank was justified in refusing to honor checks not drawn in payment of bills against the building.

Appeal from a judgment of the superior court for Lewis county, Wright, J., entered October 28, 1913, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action in tort. Affirmed.

G. E. Hamaker, for appellants.

C. A. Studebaker, for respondent.

MORRIS, J.—Action to recover damages for failure to honor a check, the appeal being taken from a judgment en-

¹Reported in 141 Pac. 340.

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Opinion Per MORRIS, J.

tered upon an instructed verdict for defendant. The appellants were the owners of a building in Chehalis, which was undergoing extensive repairs. They had become indebted to respondent bank in the sum of \$3,700, for which they had given a demand note. They were also indebted to a lumber company in the sum of \$216. The debts were pressing, and an arrangement was made between appellants and the bank under which the bank negotiated a loan from one Neiman, for \$5,200, secured by a mortgage upon the property. Upon completion of the loan, the money was deposited in the bank and appellants notified. Mr. Motter went to the bank and was then notified that the deposit was a specific one, and that the bank had been instructed by Neiman to disburse the money, first, in payment of the note due the bank and the lumber account, the balance to be applied only in payment of materials and labor used in the repair of the building, and that no check would be honored except those given for these purposes. Mr. Motter then made some objection to this as not within the understanding upon which the loan was made; but the bank insisting upon carrying out its instructions, he drew a check for the amount due the bank on the note, and also mailed one to the lumber company in payment of its account. While making some objection to the special nature of this deposit at the time of his conversation at the bank, Mr. Motter, in giving his evidence, admitted that the understanding with Neiman was that the money, when deposited in the bank, was to be used only in payment of bills against the building after taking up the note and paying the lumber account. In addition to the verbal notice, the bank sent a letter to appellants, setting forth the nature of the deposit and the purposes to which only it could be applied. The appellants say this letter was not received until some days after Motter's visit to the bank. That, however, is not material, as it is clear that Motter knew of the special feature of the deposit, at the time and before he visited the bank, and that the letter

was received prior to the day when payment of the check next referred to was refused. A few days later, appellants drew a check on the bank for \$1,061.20 in favor of another bank, thus seeking to transfer the deposit. The respondent refused payment of this check, and this refusal is made the basis of this action.

It cannot be disputed but that the deposit in the bank was a specific one, and that the bank was instructed to honor checks only for the purposes indicated in the specific deposit. This was the understanding of all parties. If appellants accepted the deposit, they must accept the conditions under which it was made. It is admitted that the check which the bank refused to honor was not drawn in payment of any bills against the building, but that its purpose was to change the account to another bank in order that appellants might carry the fund as a general deposit. Under these circumstances, the respondent bank was justified in refusing to honor the check, and we can see no ground upon which appellants can base a cause of action because of such refusal.

No special reference to the errors alleged is necessary. The judgment is affirmed.

Crow, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

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Opinion Per Gose, J.

[No. 11682. Department One. June 29, 1914.]

SARAH AVERBUCH, *Respondent*, v. MORES AVERBUCH,
Appellant.¹

JUDGMENTS—BAR—DENIAL OF DIVORCE—MATTERS CONCLUDED. The denial of a divorce being final and conclusive upon all questions which were or might have been litigated, in a subsequent action for a divorce brought by the plaintiff upon the same grounds, the testimony should be limited to the conduct of the defendant subsequent to the entry of the former judgment.

DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. In an action for divorce, findings of cruelty on the part of the husband are not warranted, where, by a former judgment denying the wife a divorce, it was determined that she was the one at fault, and that she had left her home without just cause, and since the entry of the former judgment there was no conduct of the husband amounting to cruelty, the wife testifying that she would not live with him under any circumstances.

JUDGMENT—RES JUDICATA—PLEADING—WAIVER. Where, in a former action, a divorce on the ground of cruelty was denied the plaintiff, defendant's plea of *res judicata* is not waived by alleging affirmatively that the plaintiff had been having clandestine meetings with one H. and that her affection for him was the sole cause of her leaving home, which was in accordance with the findings in the former trial.

Appeal from a judgment of the superior court for King county, Humphries, J., entered June 20, 1913, upon findings in favor of the plaintiff, in an action for divorce. Reversed.

Miller & Lysons, for appellant.

Jay C. Allen and *Herbert E. Snook*, for respondent.

GOSE, J.—This is an action for divorce. There was a judgment for the plaintiff. The defendant has appealed.

The history of the case is this: On the 15th day of April, 1912, the plaintiff commenced an action of divorce against the defendant, alleging cruel treatment. Issue was joined,

¹Reported in 141 Pac. 701.

the case tried, and on the 28th day of October, 1912, a judgment was entered in the superior court of King county, Judge Albertson presiding, denying a divorce. In harmony with an affirmative allegation in the answer in that action, the court found, "That for many months prior to the commencement of this action the said plaintiff, disregarding her duties and obligations to the defendant, her husband, has wilfully and wrongfully met and associated with one Max Hyman, at public places and on public highways and thoroughfares in the city of Seattle." While that action was pending and on the 18th day of October, 1912, the appellant commenced an action against Hyman to recover damages resulting from the alienation of the affections of his (the appellant's) wife. Issue was joined in that action, and the case was tried, resulting in a verdict and judgment in favor of the appellant for the sum of \$500.

On the first day of November, 1912, this action was commenced. On March 15, 1913, an amended complaint was filed. It alleges, that the appellant and the respondent have not lived together since April 15, 1912; that the appellant has contributed nothing to the support of the respondent for more than three months last past, and that he has been guilty of cruel treatment toward the respondent "for more than two years last past." Appellant pleaded the former judgment, after denying the alleged cruel treatment. During the progress of the trial, the respondent amended her complaint by adding an allegation to the effect that, since the trial of the former action, the appellant has failed and refused to provide her with a home, except that he informed her that she might return to her former home if she desired; that the former home was near the place of business of Max Hyman; that the respondent offered to return to the appellant if he would provide some suitable place in some other portion of the city away from said Hyman, and that, since the former trial, the appellant has treated the plaintiff cruelly, has called her vile

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names, and applied epithets to her reflecting upon her chastity. These allegations were also denied.

The court found, that the appellant had been guilty of cruel treatment toward the respondent both before and subsequent to the entry of the judgment in the first action; that the respondent has been willing to return to and live with the appellant if he would treat her kindly and not compel her to reside in near proximity to Hyman; and that, since the former trial, the appellant has not contributed to the support of the respondent.

It is elementary law that, in divorce actions, as in all others, a judgment is final and conclusive upon all questions which were or might have been litigated. *Stay v. Stay*, 53 Wash. 534, 102 Pac. 420; *Ford v. Ford*, 25 Okl. 785, 108 Pac. 366, 27 L. R. A. (N. S.) 856; *People ex rel. v. Case*, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. 578; *Wilkins v. Wilkins*, 84 Neb. 206, 120 N. W. 907, 133 Am. St. 618; *Peterson v. Peterson*, 68 Minn. 71, 70 N. W. 865; *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Brown v. Brown*, 37 N. H. 536, 75 Am. Dec. 154; Nelson, Divorce & Separation, § 555; 2 Van Fleet, Former Adjudication, pp. 712-13; 1 Freeman, Judgments (4th ed.), § 313.

The respondent argues that, because in divorce actions an act once condoned may be re-examined in case of subsequent misconduct, the same principle applies to a judgment. The difference is this: Condonation is forgiveness with an implied condition that the injury shall not be repeated, and on breach of this condition the right to a remedy for former injuries revives (Greenleaf, Evidence, 14th ed., § 53); whereas, the rule with respect to judgments is that a case once decided is finally decided, subject only to the right of review in some method prescribed by law.

The court should have limited the testimony to the acts and conduct of the appellant subsequent to the entry of the former judgment. This he did not do, but, on the contrary, permitted the case to be tried as though there had never been a

former trial. The findings of the court as to the misconduct of the appellant subsequent to the entry of the former judgment cannot be sustained. Indeed, it may be confidently asserted that there is nothing which rises to the stature of evidence to sustain them. The former judgment determined that the respondent was the wrongdoer, and in effect, that she left her home on the 15th day of April, 1912, wrongfully and without just cause or excuse. In the *Stay* case, we said, "the home is itself an invitation" to the wife; that, where a wife leaves home without just cause or excuse, it is her duty to return; that the duty of maintaining the home is put upon the husband, and that, so long as he is not at fault, the corresponding duty of living in and keeping the home is on the wife, and that it is not the duty of the husband who is without fault to support the wife while she wrongfully remains away from home. The respondent testified that she would not live with her husband under any condition. The testimony of a disinterested witness shows that the respondent stated to him that she would not live with her husband because, she said, as he stated, "I have got somebody else to like now." A witness also testified that the respondent said after the trial of the Hyman suit, "My husband wins the \$500, and Max wins his wife." A witness testified in behalf of the respondent that the appellant said of his wife since the former trial, "She runs just like she runs to her lover." This is far from showing cruelty when measured by the finding of the court in the first trial.

It is contended, (a) that the former judgment was not properly pleaded, and (b) that the defense of *res judicata* was waived by a plea of new matter and the introduction of testimony *aliunde* the record. Neither of these contentions is tenable. It is true that, in addition to the plea of *res judicata*, the appellant alleged affirmatively that the respondent had been in the habit of having clandestine meetings with Max Hyman, and that her affection for Hyman was the sole cause of her leaving home. This plea was in harmony with

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the finding made by Judge Albertson on the first trial, and is not a waiver of the plea of *res judicata*.

It is needless to further consider the case. Practically every question before the trial court had been decided adversely to the contentions of the respondent in the *Stay* case before the last trial of this case. Taking the former judgment as an initial point, the respondent showed no ground for divorce.

The judgment is reversed, with directions to dismiss the action. The appellant will recover costs.

Crow, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 11697. Department One. June 29, 1914.]

THE STATE OF WASHINGTON, *on the Relation of F. A. Kern,*
Prosecuting Attorney etc., Respondent, v.
MARGARET JEROME *et al., Appellants.*¹

NUISANCES—DISORDERLY HOUSE—ACTION TO ABATE—DEFENSES—ABATEMENT BY PARTIES—GOOD FAITH—EVIDENCE—SUFFICIENCY. In a prosecution under the "Red Light Law," 3 Rem. & Bal. Code, § 946-1 *et seq.*, a permanent abandonment, in good faith, of the use of a house for the purposes of prostitution, is not shown so as to warrant the court in denying a permanent injunction against the premises, where the facts merely show a hasty change in existing conditions after the prosecution was instituted, coupled with a declaration by the parties not to again engage in or permit the business at the place in question.

SAME—ACTIONS TO ABATE—PROCEEDINGS—TAX—LIABILITY ON RELEASE BY BOND. The giving of a bond to abate a prosecution under the "Red Light Law" does not relieve the property from the tax of \$300 assessed against the property, in view of 3 Rem. & Bal. Code, § 946-7, which provides that the court may cancel the order of abatement and deliver the premises to the owners upon the filing of a bond to abate the nuisance and prevent its renewal for a period of one year, provided that the release of the property shall not release it from any judgment, lien, penalty or liability.

TAXATION—UNIFORMITY—CHARGE ON BUSINESS—NUISANCES. 3 Rem. & Bal. Code, § 946-8, providing that in prosecutions under the

¹Reported in 141 Pac. 753.

"Red Light Law" whenever a permanent injunction issues, a tax of \$300 shall be assessed against the building and grounds and against the owners, does not offend against the constitutional provisions providing for uniformity and equality of taxation, since the tax is upon the traffic or business and applies to all persons offending against its provisions.

CONSTITUTIONAL LAW—DUE PROCESS—TAX—NOTICE. The "Red Light Law," resulting in a tax against property offending against the law, does not offend against the due process clause of the constitution, since the persons interested are served with process and have their day in court.

NUISANCES—DISORDERLY HOUSE—ACTIONS TO ABATE—JUDGMENT—PENALTY—SALE OF PROPERTY. In providing for the abatement of houses of prostitution, under the "Red Light Law," it was competent for the legislature to require the building to be closed for a period of six months, and to order the personal property used to be sold and applied to the payment of costs.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered August 8, 1913, upon findings in favor of the plaintiff, in an action to abate a nuisance, tried to the court. Affirmed.

E. K. Brown, for appellants.

F. A. Kern and *Jay Whitfield*, for respondent.

MAIN, J.—This action was instituted for the purpose of abating a nuisance and obtaining an injunction against its continuance.

The suit was brought under chapter 127, Laws of 1913, p. 391 (3 Rem. & Bal. Code, § 946-1 *et seq.*), known as the "Red Light Law," in the name of the state of Washington, on the relation of the prosecuting attorney of Kittitas county. The defendants were Mary A. Bort and W. H. Bort, her husband, and one Margaret Jerome.

The facts are substantially as follows: At the time of the institution of the suit, and for many years prior thereto, Mrs. Bort was and had been the owner of lots 1 and 2, block 25, in Murray's addition to the city of Ellensburg. Upon these lots had been erected a nine room dwelling house. The

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premises were located within the limits of the town known as the "restricted district," prior to the month of May, 1911, when that district was closed by the city authorities. Prior to the closing of the district, the place had been occupied and used as a house of prostitution. From the month of May, 1911, until March, 1913, the premises were vacant and unoccupied. On March 21, 1913, Mrs. Jerome contracted with the Borts for the purchase of the premises. The contract price was \$4,000, \$250 of which was paid in cash, and the remaining portion was to be paid in installments of \$50 per month. Prior to the month of May, 1911, when the district was closed, Mrs. Jerome had occupied and used the same premises as a house of prostitution and paid \$75 per month rent therefor. After making the contract of purchase mentioned, Mrs. Jerome entered into possession of the property, and thereafter and until the 28th day of June, operated therein a house of prostitution. During this time, but two prostitutes were in the place, Mrs. Jerome and one other. On the 28th day of June, 1913, both were arrested for practicing prostitution in violation of law. They remained in the house, however, until the evening of the 30th day of June, when they left the place. From the date of their arrest until the abandonment of the premises, prostitution was not practiced by them. On the 30th day of June, the present action was instituted against the Borts and Mrs. Jerome, the latter being served with process while still in possession of the house. On July 1, 1913, the day immediately following the service of the process in this case, by mutual agreement, the contract between the Borts and Mrs. Jerome was cancelled and possession surrendered to the owners. Immediately thereafter, the Borts caused to be removed from the house all personal property therein belonging to them. The house, in its vacant condition, was closed and so remained up to the time of the trial.

The cause was tried in the superior court on July 17, 1913. A judgment was entered as follows: (a) Enjoining

the further practice of prostitution in the house mentioned; (b) providing that the fixtures and furniture used in connection with the conduct of the house be sold as provided by law; (c) that the house be closed for a period of six months; and (d) that the assessor of the county be directed to assess against the dwelling house and the ground upon which it was located, and against the defendants in the action, a tax in the sum of \$300. From this judgment, the Borts appeal.

The principal claims of error are: First, the granting of injunctive relief; second, the refusal of the court to accept the bond upon the condition that it was offered; third, that the tax provided for in the judgment offends against both the equal tax and the due process of law provisions of the constitution; and fourth, in ordering the sale of the personal property and closing the house for a period of six months.

I. The question whether the injunction was properly issued calls for a consideration of the provisions of the law under which the action was instituted. The "Red Light Law" of this state, passed at the legislative session for the year 1913, is a substantial embodiment of the law passed by the legislature of the state of Iowa upon the same subject during the year 1909. The Iowa law was taken from the cigarette and liquor laws of that state, reenacting the regulatory and prohibitory provisions of those laws, and making the same applicable to houses of prostitution. The law of this state, among other things, provides, that whoever shall erect, establish, maintain, continue, use, own, or lease any building or place for purposes of prostitution, is guilty of a nuisance, and the building and furniture are likewise declared a nuisance; that whenever a nuisance exists, as defined in the act, the prosecuting attorney, or any citizen of the county, may maintain an action in equity in the name of the state to properly enjoin said nuisance and the person or persons conducting the same and the owner or the agent of the building or ground upon which the nuisance exists; that, if the existence of the nuisance be established, an order of

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abatement shall be entered as part of the judgment in the case, which order shall direct the removal from the building of all furniture and fixtures used in conducting the nuisance, and that the same shall be disposed of by sale as therein provided and the proceeds used in the payment of the costs of the action and abatement, and the balance, if any, paid to the person owning the property prior to the sale. Other provisions of the law will be noted in connection with the discussion of the points to which they may be applicable.

The Iowa law, while passed in 1909, so far as we are informed, has never been construed by the supreme court of that state. But the liquor and the cigarette laws, which have substantially the same provisions, have frequently been before that court. In *Judge v. Kribs*, 71 Iowa 183, 32 N. W. 324, the court, considering the question as to when an injunction should issue, said:

"The several defendants were witnesses in their own behalf, and severally testified, with more or less directness, that they, after notice of the hearing for the allowance of a temporary injunction was served on them, had quit the business, and, as one of them stated, he had 'reformed.' In all instances, we believe, such reformation occurred a day or two before the hearing. It is upon this ground, we presume, the court refused to grant an injunction. If the nuisance is abated, there is nothing to enjoin, nor would the defendants be in any respect prejudiced if one was granted. But where it is ascertained that one has violated the rights of another, or of the public, by erecting and maintaining a nuisance, does it necessarily follow, because he asserts the nuisance has been abated, that a temporary injunction cannot issue? Suppose there is a small-pox hospital established and maintained in the populous part of a city, and that it is furnished with all the appliances used for properly and judiciously taking care of the patients, and that an application is made to enjoin such use, and abate the nuisance; and, upon the hearing for an injunction, the proprietor should testify that he had quit the business, and removed the patients a day or two prior to the hearing,—would the court be bound for this reason to refuse the injunction? We think not, but, on the

contrary, the court, in its discretion, could restrain the party from so using the building in the future. So here it appears from the evidence that the defendants were engaged in selling intoxicating liquors contrary to law, and kept and maintained a building for that purpose. Upon being advised that an effort was about to be made to vindicate the law, they suddenly reformed and quit the business.

"It appears to us that there is a great reason to suppose such a reformation is not in good faith. There is also reason to believe it was adopted as a temporary expedient. The evidence, we think, tends to show, or, if not, this court does not feel disposed to accept the evidence of the defendants that they have ceased the unlawful sale of intoxicating liquors as conclusive evidence of such fact. Much less do we feel disposed to do so as to the future. Having been engaged in violating the law, it is not by any means certain that they will not do so in the future. The disposition to do so clearly appears, and there are heavy doubts as to the good faith of the reformation."

That decision was rendered in 1887. Thereafter numerous cases were brought before the same court, and in *Tuttle v. Bunting*, 147 Iowa 153, 125 N. W. 844, decided during the year 1910, that court classified its previous decisions and restated the rule in this form:

"Defendants complain of the decree of permanent injunction and also of the order for the abatement of the nuisance. Reliance is placed upon: *Redley v. Greiner*, 117 Iowa 680, 91 N. W. 1033; *Patterson v. Nicol*, 115 Iowa 284, 88 N. W. 323; *Drummond v. Drug Co.*, 133 Iowa 266, 110 N. W. 471; *Sharp v. Arnold*, 108 Iowa 203, 78 N. W. 819; and other like cases in support of the appeal. On the other hand, appellee relies upon *Halfman v. Spreen*, 75 Iowa 309, 39 N. W. 512; *Judge v. Kribs*, 71 Iowa 183, 32 N. W. 324; *Danner v. Hotz*, 74 Iowa 391, 37 N. W. 969; *Donnelly v. Smith*, 128 Iowa 257, 103 N. W. 776; *Drummond v. Drug Co.*, 133 Iowa 266, 110 N. W. 471. The distinction between these cases is that, in one class, the trial court was of opinion that defendants had, in good faith, gone out of the business, and did not intend to again re-engage in it at the place in question or at any other place; while, in the other class, although the defendants had ceased the business and pro-

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fessed reformation, the brief time elapsing after the reformation and before trial or other circumstances disclosed were deemed insufficient proof of such repentance as to secure defendants immunity from an injunctive order. The question, after all, is largely one of good faith. In other words, if defendants have, in good faith, parted with the property, have quit the unlawful business, and do not expect or intend to engage in the business of selling liquor unlawfully, there is no occasion for the issuance of the injunction. If, on the other hand, there be doubt as to the defendants' good faith or a question about their repentance, the order will issue to assist in removing the temptation to return to old habits."

The rule of these cases is that, if the proof establishes conclusively that the defendants have in good faith permanently abandoned the business, and do not intend to re-engage in it at the place in question, or any other place, then an injunction should not issue; but if there is a doubt as to whether the business has been permanently abandoned in good faith, it presents a proper case for granting a permanent injunction. In order to show an abandonment in good faith within this rule, it is not sufficient to show that, after the prosecution was instituted, there was a swift change in existing conditions, coupled with a professed declaration not to re-engage in the business. *Judge v. Kribs, supra*; *Danner v. Hotz*, 74 Iowa 389, 37 N. W. 969; *Drummond v. Richland City Drug Co.*, 133 Iowa 266, 110 N. W. 471; *Donnelly v. Smith*, 128 Iowa 257, 103 N. W. 776. In the case last cited, it was said:

"Should we concede that, before the hearing for the writ, defendant had brought the conduct of his business into conformity with law, this could avail him nothing. One who has been engaged in the traffic in intoxicating liquors in open violation of law cannot avoid an injunction by simply making profession of a change of heart, and a swift change in existing conditions. Common experience has led to the conclusion that in all such cases the effort to reform should be given substantial aid, in the way of a temporary writ. Such is the thought of the cases above cited."

In the present case, the evidence shows that, prior to the year 1911 when the district was closed, the premises in question were leased to Mrs. Jerome and were operated as a house of prostitution in violation of law. It is true that the law at that time was not as stringent as is the present law. But it was nevertheless an unlawful business. The trial court found that the reason which prompted Mrs. Jerome to abandon the premises was the fact that she had been arrested and charged with conducting a house of prostitution, and that the Borts had full knowledge of the fact that, between the date of the purchase and the 28th day of June, 1913, the dwelling house was being used for the purpose of prostitution.

It is argued, with some vigor, that these findings are not supported by the evidence; but an attentive consideration of the entire record shows that a court would be exceedingly credulous that could find from the evidence in the case, either that the abandonment of the premises was not prompted by the prosecutions, or that the Borts did not have knowledge of the purpose for which the house was being used. It is true, as shown in the facts stated, that, after the two women occupying the house had been arrested on the 28th day of June, no further acts of prostitution were permitted therein; that, between this date and the 1st day of July, they caused their personal effects and the furniture in the house to be removed, and on the 1st day of July, the contract of purchase to be canceled and the premises to be surrendered to the owners; that the owners immediately removed therefrom such articles of furniture therein as belonged to them and closed the house, and that it remained closed until the time of the trial, which occurred on the 17th of July. These facts show a hasty change in existing conditions after the prosecutions were instituted, coupled with what is equivalent to a declaration on the part of the Borts not to permit the business to be again engaged in at the place in question, and on the part of Mrs. Jerome not to engage in it therein. Applying the rule above

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stated, the showing is not sufficient to justify this court in reversing the trial court and thereby holding that the evidence conclusively establishes a permanent abandonment in good faith. Such a holding would, in effect, nullify that provision of the law which imposes a tax of \$300 upon the premises which have been used in violation of the statute, as a similar showing could doubtless be made in practically every case. Manifestly the legislature did not intend to do an idle thing when it embodied in the law that provision relative to the tax, because it is only when a permanent injunction issues that the tax is to be assessed.

II. At the conclusion of the trial, the Borts offered to file a bond conditioned that the alleged nuisance would be immediately abated and would not be renewed for a period of one year, provided that the \$300 tax mentioned in the act should not be imposed. The court refused to accept the bond because of the stipulation that the tax should not be imposed. Section 7 (Id., § 946-7) of the act provides, that, if the owner appears and pays the costs of the proceeding, and files a bond to abate the nuisance and prevent the same from being established or renewed within a period of one year, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to the owner, and that the order of abatement be canceled so far as the same may relate to said property, "and that the action shall thereby be abated as to said building only." The last sentence of the section is: "The release of the property under the provisions of this action (section) shall not release it from any judgment, lien, penalty or liability to which it may be subject by law." This section contemplates that, upon the giving of the bond therein provided, the action shall be abated as to the building only, but that it shall survive for every other purpose. If the giving of a satisfactory bond prevents the tax, then the final sentence in the section must be read out of the law, because it expressly provides that the re-

lease of the property under the bond shall not release it from "any judgment lien, penalty or liability."

III. Section 8 (Id., § 946-8) of the act provides, that, whenever a permanent injunction issues, "there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of three hundred dollars." The method of the assessment is further provided for and the manner of collection. This is a tax upon the traffic or business which the legislature saw fit to impose, not for the purpose of giving countenance to it, but as a deterrent against engaging therein. This portion of the act does not offend against the constitutional provisions providing for uniformity and equality of taxation. The act is general and applies to all persons who may offend against its provisions. Section 1 (Id., § 946-1) in defining what shall constitute a nuisance, uses the terms "whoever shall erect, establish, maintain," etc. Obviously the argument that the law provides for a tax not uniform or equal is not well founded. Neither is that provision of the constitution known as the due process of law clause offended against. The appellants in this case were made parties to the action and process was served upon them. They appeared and contested the validity of the tax. They therefore had their day in court. Had there been an attempt to levy the tax without making all the owners parties to the action, a different question would be presented, upon which we express no opinion.

Under the Iowa cigarette law, the opportunity given the owner to test the tax was a provision of the law which permitted him to make application at the meeting of the board of supervisors next following the listing of the property as subject to the tax. This application could be made at any time after the property had been assessed, upon eight days' notice given to the county attorney. The law was sustained, both by the supreme court of the state of Iowa and the supreme court of the United States. In *Hodge v. Muscatine*

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County, 121 Iowa 482, 96 N. W. 968, 104 Am. St. 804, 67 L. R. A. 624, speaking of the tax proposed by that law, it was said:

"It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. It confers no right, but imposes an impediment to the transaction of the business. It is clearly a tax on that business, levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race, and particularly upon children, of the use of cigarettes. Indemnity and protection of the public against evils resulting from the nature and character of the business is the central thought. It also partakes of the nature of a police regulation, but it is not to be wholly so regarded. Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaiming it invalid. 2 *Desty on Taxation*, 1384. Being a tax it was competent for the legislature to prescribe the proceedings and processes for its collection."

That case was taken to the United States supreme court, and the decision of the Iowa supreme court was affirmed. 196 U. S. 276. Speaking relative to the provisions for the enforcement of the collection of the tax, it was said:

"Coming now to the provisions for its enforcement, it is entirely clear that, as to the person actually carrying on the business, no notice of the assessment or levy of the tax is necessary. If the person carries on the business, the imposition of the tax follows as a matter of course. There is no discretion as to the amount. [Citing authorities.]

"It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax upon the business carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in

respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business."

IV. The judgment of the superior court provided that the building be closed for a period of six months, and that the furniture and fixtures made use of in conducting the nuisance be sold and the proceeds applied in payment of the costs, and that the balance, if any, be paid to the defendants as their interests might appear. This judgment is in accord with the provisions of the law. The action was against the thing, the place, as well as against the person. The closing of the building for a period of six months was a consequence of the unlawful acts of the defendants and was designed to secure the enforcement of the law. In providing for the abatement of a nuisance, the legislature may confer upon the court power to order the personal property used in connection therewith sold, and the proceeds applied in payment of the costs, and that the dwelling house, in the absence of the giving of a bond, as provided in the statute, be closed for a period of six months. *State v. Adams*, 81 Iowa 593, 47 N. W. 770; *Craig v. Werthmueller*, 78 Iowa 598, 43 N. W. 606.

The judgment of the superior court will be affirmed.

CROW, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 11533. Department One. June 30, 1914.]

**ARDEN L. SMITH *et al.*, Appellants, v. KING COUNTY *et al.*,
Respondents.¹**

HIGHWAYS—VACATION—BY ABANDONMENT—USE—SUFFICIENCY. Streets in a plat outside of an incorporated town are not opened for public use within the space of five years after the filing of the plat, within Rem. & Bal. Code, § 5673, vacating such streets, where, during such time, the travel was only casual and intermittent and by foot paths through brush and stumps to reach a camping place without reference to the dedicated way.

DEDICATION—VACATION OF STREETS—ABANDONMENT—DEED AS IRREVOCABLE DEDICATION. Upon an issue as to the vacation of a street in an unincorporated town by failing to open the same within five years after the filing of the plat, conveyances of certain lots and blocks by reference to the plat do not operate as an irrevocable dedication of the streets, where the purchasers were not parties to the litigation and their rights could not be affected by the result.

ESTOPPEL—PARTIES ENTITLED TO CLAIM. An estoppel operates only in favor of those who have been misled to their injury, and they alone can set it up.

DEDICATION—VACATION OF STREETS—ABANDONMENT—DEED AS REDEDICATION—REVOCATION THEREOF. Where streets in an unincorporated town were vacated by abandonment, a deed of general warranty subject to all easements, rights and privileges granted to the public by the plat and dedication thereof, does not operate as a rededication of the streets, since the easements therein had been extinguished by operation of law; especially where, twenty days later, the grantees acquired title by a deed of general warranty without any exception clause; since any implied easement would be thereby revoked.

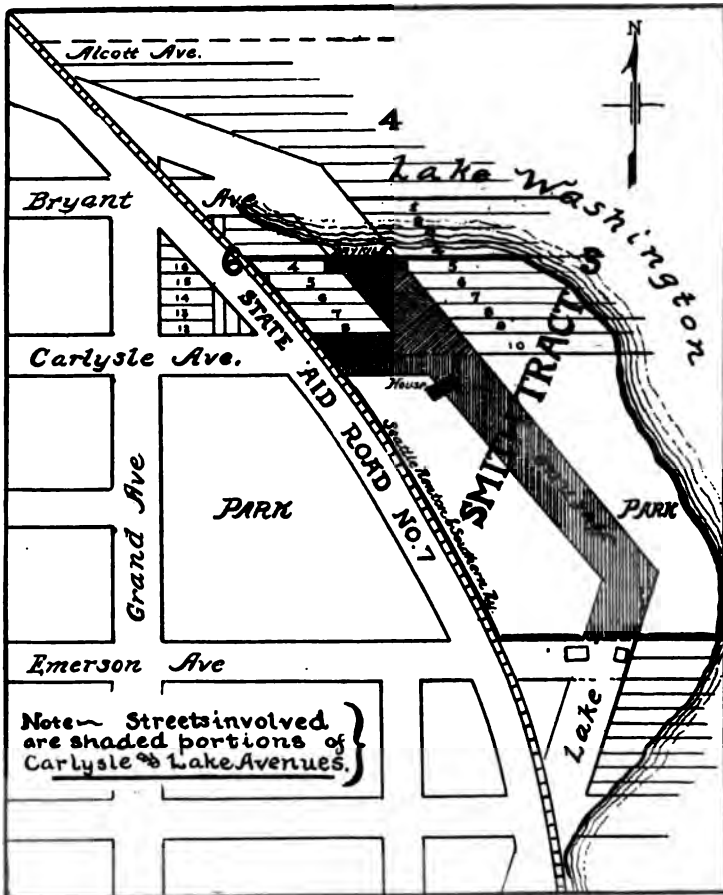
Appeal from a judgment of the superior court for King County, Smith, J., entered April 19, 1913, upon findings in favor of the defendants. Reversed.

G. E. de Steiguer and *R. E. Thompson, Jr.*, for appellants.

John F. Murphy and *Samuel Morrison*, for respondents.

¹Reported in 141 Pac. 695.

GOSE, J.—On April 16, 1890, Lillie R. Parker and William E. Parker, being the owners of a tract of “logged-off” land, in King county, then and now without the limits of any incorporated city or town, platted the same as Bryn Mawr. The plat contains sixty-two blocks. The property involved in this controversy lies within the heavy lines shown upon the annexed plat, and embraces all of Lake avenue between the north line of Emerson avenue and the south line of Bryant avenue, and that part of Carlyle avenue lying east of the railway line.



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On August 29, 1905, the Bryn Mawr Land Company, being then the owner of practically all of the lands embraced in the plat of Bryn Mawr, conveyed to the appellant Arden L. Smith, by deed of general warranty, by metes and bounds, all the land embraced in the plat lying between the meander line of Lake Washington and the line of the Seattle, Renton & Southern railway, and between the north line of Emerson avenue and the south line of lot 4, block 5, of Bryn Mawr, as shown upon the plat.

On the first day of August, 1912, the plaintiffs commenced this action, alleging that the portions of the platted streets included in their deed have remained unopened for public use ever since the filing of the plat, a period of more than twenty-two years, and that the defendants King County and its board of county commissioners were then threatening and preparing to destroy the plaintiffs' fences inclosing the premises, and to appropriate the land involved to the use of the county as a public highway, and asking for an injunction. Issues were joined and a trial had, terminating in a judgment in favor of the defendants. The plaintiffs prosecute an appeal.

The appeal presents three principal questions: (1) Were the streets involved opened for public use within a space of five years after the filing of the plat on April 16, 1890? (2) If not, did certain deeds executed in 1903 and 1904, conveying lots and blocks in accordance with, and by express reference to, the plat, operate as an irrevocable dedication of the streets? And (3) did a certain clause in the deed from the Robertson Mortgage Company to the Bryn Mawr Land Company, executed August 9, 1905, operate as a rededication?

In respect to the first question, little need be said. Practically all of the evidence is that the only travel upon Lake avenue and Carlyle avenue east of the railroad track, from the time of the filing of the plat until subsequent to the time the appellant acquired the property involved, was casual, intermittent, and inconsequential. This is shown, not only by testimony coming from the mouths of witnesses, but by photo-

graphs which were introduced in evidence which show stumps, logs and brush in the avenue. Certain of the respondents' witnesses testified to re-staking and brushing out the property in controversy some time in 1903. The testimony is that they found brush, stumps, and logs in the streets. The testimony shows that a part of Lake avenue and the property designated on the plat as "Park" were used for many years as a camping ground, and that the travel followed winding foot paths which ran promiscuously without reference to the streets. The Seattle, Renton & Southern railroad was built in 1896, and campers who got off the car at Carlyle avenue went to their camping grounds along these paths.

Our statute, Rem. & Bal. Code, § 5673 (P. C. 441 § 83), declares that any county road or part thereof which has been authorized, which remains unopen for public use for the space of five years after authority is granted for opening the same, shall be vacated. In *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115, we held that the statute applies to streets without the limits of incorporated cities or towns. In *Hagen v. Bolcom Mills*, 74 Wash. 462, 133 Pac. 1000, 134 Pac. 1051, we said that, when the vacation occurs by operation of law or otherwise, the land is freed from the easement as completely as though it had never existed, and that the owner of the soil has an absolute title to the same. In *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806, we held that an offer of dedication may be accepted by a public user. A statutory dedication of streets to a public use is merely a tender of a servitude or easement to the public which the public is at liberty to accept or reject. *Scott v. Donora Southern R. Co.*, 222 Pa. St. 634, 72 Atl. 282. In *Cheney v. King County*, 72 Wash. 490, 130 Pac. 893, we said that casual and intermittent travel by foot paths or otherwise over a dedicated way is insufficient to constitute an opening of the way for public use such as the statute contemplates. We conclude that the streets were not open for public use within the space of five years after the filing of the plat of dedication. *Maggs v.*

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Seattle, 74 Wash. 323, 133 Pac. 388. We have not overlooked *Brokaw v. Stanwood*, 79 Wash. 322, 140 Pac. 358, which is based upon facts so essentially different from the facts under review, that further comment is unnecessary.

The second inquiry presents a two-fold aspect: (a) Upon objection by counsel for respondents, the court rejected that portion of the abstract of title showing the conveyances made in 1903 and 1904, describing the property conveyed in accordance with the plat; and (b) the purchasers are not parties to this litigation and their rights cannot be affected by the result. Their rights, if any, depend upon the doctrine of estoppel. Moreover, they or their successors in title may have since compromised or lost the right so acquired. These questions we are not called upon to consider or decide. The estoppel, if any, operates only in favor of those who have been misled to their injury, and they alone can set it up. *Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. 444.

The respondents rely upon *Boise City v. Hon*, 14 Idaho 272, 94 Pac. 167; *City of Corsicana v. Zorn*, 97 Tex. 317, 78 S. W. 924, and *Poudler v. City of Minneapolis*, 103 Minn. 479, 115 N. W. 274. These authorities announce the rule that, where the owner sells lots or blocks in accordance with and by express reference to a plat, the plattors and their grantees are estopped to deny the legal existence of such streets as are described in the plat, and that there is no distinction between the rights of the grantee who purchased according to the plat and the rights of the public generally, in respect to the streets thus dedicated. We think the Virginia case announces the better rule. Moreover, the cases relied upon by the respondents arose out of litigation over streets in cities. Let us turn the question around and suppose that some one had been injured while traveling upon Lake avenue and had sued the county, alleging that fact and alleging that the county had not used reasonable care in maintaining the street in a reasonably safe condition for travel. Upon the record, no court would permit or sustain a recovery. There

is no pretense that the county or its official representatives did any work upon the property or took any action looking to an acceptance of the streets involved, until a few days before the commencement of this action in 1912.

The third contention is that the conveyance from the Robertson Mortgage Company to the Bryn Mawr Land Company, the appellants' immediate grantor, on August 9, 1905, contains a clause which operates as a rededication. The deed is a general warranty "subject to all easements, rights and privileges conferred or created or granted to the public or otherwise, by said plat of Bryn Mawr and the dedication thereof." The obvious purpose of this clause was to except from the warranty, as the exception states, those easements which were created or granted by filing the plat of dedication. As we have seen, these easements had become extinguished by operation of law. Moreover, twenty days later, the appellants acquired title by a deed of general warranty without any exception clause. Between these dates, nothing occurred which would prevent the owner from revoking any implied easement created by the deed of August 9. It seems clear, first, that there was no intention to rededicate by the deed of August 9; and second, if, by any strained or forced construction, such effect could be implied, the dedication was revoked by the deed to appellants twenty days later. A dedication of land to the use of the public, whether express or implied, may be revoked at any time before it has been accepted. *Norfolk v. Nottingham, supra*. It has also been held, and upon sound ground, that a conveyance of an unaccepted street or highway revokes the dedication. *Minneapolis & St. L. R. Co. v. Town of Britt*, 105 Iowa 198, 74 N. W. 933; *Clendenin v. Maryland Const. Co.*, 86 Md. 80, 37 Atl. 709; 9 Am. & Eng. Enc. Law (2d ed.), 78. It may also be revoked by applying the highway to any permanent use inconsistent with the purpose of the dedication. *Trerice v. Barteau*, 54 Wis. 99, 11 N. W. 244; *Lee v. Eake*, 14 Mich. 11; *Field v. Village of Manchester*, 32 Mich. 279.

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Upon the entire record, we are constrained to hold that the learned trial court was in error in concluding that any part of the property in controversy is a public highway. The judgment is reversed, with directions to enter a decree enjoining the respondents from proceeding further.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11619. Department One. June 30, 1914.]

C. F. MERRIFIELD, *Appellant*. v. COMMERCIAL WATERWAY DISTRICT No. 1, OF KING COUNTY *et al.*, *Respondents*.¹

CANALS — WATERWAY DISTRICTS — ESTABLISHMENT — CONTRACTS — POWER OF COMMISSIONERS. Under 3 Rem. & Bal. Code, §§ 8166a and 8177a, authorizing the commissioners of a waterway district to employ engineers to assist them in compiling data required to be presented to the court in the petition for the formation of the district, and such legal and other assistance as may be necessary, the commissioners have no power to enter into a contract to employ an engineer as an expert adviser for the purpose of preparing the assessment roll, at \$300 per month, the employment to continue until the roll had been finally settled by the supreme court; since after the work was completed and before termination of the employment, a considerable period of time must elapse during which no service could be rendered.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 11, 1913, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Carkeek, McDonald & Kapp, for appellant.

Shorett, McLaren & Shorett, for respondents.

MAIN, J.—The purpose of this action was to recover damages claimed to be due on account of the breach of a contract. The complaint, aside from the formal allegations, is, in substance, as follows:

On or about the 12th day of April, 1911, the commission-

¹Reported in 141 Pac. 685.

ers of commercial waterway district No. 1, entered into a contract in writing whereby the plaintiff was employed to act as an expert adviser for the purpose of preparing the assessment roll for what is known as the Duwamish river improvement, in commercial waterway district No. 1. The compensation which the plaintiff was to receive for his services in the preparation of such roll and the preparing of the data therefor, was \$300 per month. The employment began on April 17, 1911, and was to continue until the roll had been finally settled by the superior court of the state of Washington for King county. In accordance with the terms of the written contract, the plaintiff commenced work for the waterway district on or about the 17th day of April, 1911, and continued in such employment until on or about the 2d day of August, 1911, when, without any reason, the plaintiff was discharged from such employment. The roll, as prepared by the plaintiff, with slight changes and variations, was submitted to the superior court of the state of Washington for King county in the months of October, November, and December, 1912. Judgment on the same was entered on or about the 12th day of December, 1912.

To this complaint, a demurrer was interposed and sustained by the trial court. The plaintiff refused to plead further and elected to stand upon his complaint. Thereupon judgment was entered dismissing the action. The present appeal followed.

The answer to one question is decisive of this case. That question is, whether the waterway district commissioners have the power to contract with a person for the performance of a particular work and extend the term of employment beyond the time when that work must necessarily be accomplished. The complaint alleged that the appellant was to act as an expert adviser in the preparation of an assessment roll for the waterway district, and that the roll as prepared by the appellant, with some slight changes and variations, was settled by the superior court on the 12th day of December, 1912.

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The commercial waterway district statute, Laws of 1911, ch. 11, p. 12, § 2 (3 Rem. & Bal. Code, § 8167a) provides: That whenever it is desired to prosecute the construction of a system of waterways within a district, the commissioners thereof shall file a petition in the superior court setting forth, among other things, the names of the owners whose lands are to be benefited by the proposed improvement and the description of such land and the maximum amount of benefits to be derived by each lot or tract of land within the district. Reading the allegations of the complaint in connection with the provisions of the commercial waterway district law referred to, it is evident that the assessment roll referred to in the complaint was the preparation of a roll embodying the particular lots or tracts of land within the district that would be benefited and fixing the maximum amount thereof. This data, as already noticed, was required by the law to be embodied in the petition filed in the superior court when the proceeding was instituted. The complaint does not show at what time the petition in the case was filed. The records of this court show that, after the petition had been filed and prior to the time when the case was tried to a jury for the purpose of ascertaining the value of the property taken, the damages to the remainder, and the maximum benefits, the cause was brought to this court by writ of certiorari. *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791. It therefore appears that, after the work for which the appellant was employed was accomplished, a considerable period of time elapsed before judgment was entered upon the verdict of the jury fixing the maximum benefits. During at least a material portion of this time, there was no service which the appellant could render the district, either in the preparation of or as an adviser in connection with the so-called assessment roll.

The power of the waterway district commissioners relative to the making of contracts is set forth in §§ 1 and 12 (Id., §§ 8166a, 8177a) of the waterway district law above referred

to. By § 12 (Id., § 8177a) it is provided that, in the preparation of the facts and data to be inserted in the petition and filed therewith for the purpose of presenting the matter to the superior court, the district may employ one or more good and competent engineers, surveyors, and draftsmen to assist them in compiling data required to be presented to the court with the petition and "such legal and other assistance as may be necessary, with full power to bind said district for the compensation of such assistance or employees employed by them." The words just quoted do not, nor does any other provision of the statute to which our attention has been called, authorize or empower the waterway district commissioners to extend the term of employment beyond the time when the work sought to be accomplished shall have been completed. Whether the legislature could authorize such an employment is not now before us. Neither is the question of the right of the district to enter into a contract to extend for a period of time reasonably necessary for the accomplishment of a particular work or purpose.

The appellant, as sustaining the validity of the contract, cites the case of *Cramer v. Water Commissioners of New Brunswick*, 57 N. J. L. 478, 31 Atl. 384. In that case the plaintiff was employed for a period of five years as superintendent of the water works. Before the term expired, he was discharged and another superintendent employed to fill the position. In a suit brought for the purpose of recovering damages, the validity of the contract was sustained. That case is distinguishable from the present one, however, in this: There, the subject-matter of the employment continued beyond the time when the plaintiff was discharged; while here, the work sought to be accomplished under the contract of employment must necessarily be substantially completed a considerable period of time before the time fixed in the contract for its termination.

The judgment will be affirmed.

CROW, C. J., ELLIS, CHADWICK, and GOSE, JJ., concur.

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Opinion Per MAIN, J.

[No. 11685. Department One. June 30, 1914.]

MARGARET E. THURMAN, *Appellant*, v. JOSEPH KILDALL,
Respondent.¹

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. Affidavits used upon a hearing must be brought up on appeal by bill of exceptions or statement of facts, and it is not enough to include them in the clerk's transcript and refer to them in the statement of facts as "hereby made a part hereof," in view of Rem. & Bal. Code, § 390, requiring them to be appropriately referred to in, and attached to, the statement of facts certified to by the judge.

Appeal from an order of the superior court for King county, Smith, J., entered September 2, 1913, vacating a foreclosure judgment and sheriff's sale, after a hearing upon affidavits. Affirmed.

Gates & Emery, for appellant.

Willett & Oleson, for respondent.

MAIN, J.—This is an appeal from an order of the superior court vacating and setting aside a sale by the sheriff of King county of five hundred shares of corporate stock. The original action was upon a promissory note, which was secured by a pledge of the certificate for five hundred shares of the capital stock of the Pacific Coast & Norway Packing Co. Judgment was entered upon the note, and foreclosure directed upon the certificate of stock. Thereafter, and on the 21st day of June, 1913, the stock was sold by the sheriff. Subsequently a motion was interposed to set aside and vacate the sale. This motion was heard in the superior court upon affidavits, and a judgment was entered vacating the sale, from which this appeal is prosecuted.

The affidavits used at the hearing upon the motion are not

¹Reported in 141 Pac. 691.

embodied in or annexed to the statement of facts, but an attempt is made to make them a part thereof by reference. Each affidavit is referred to in the statement of facts by the name of the affiant and date and followed by this provision: "Which is on file herein to which reference is made, and the same is hereby made a part hereof." The respondent opens his brief with a number of motions, one of which is to strike the statement of facts, for the reason, as it is claimed, that the same is not prepared in accordance with the requirements of the law. The affidavits referred to, it should be noted, are contained in the clerk's transcript.

By repeated decisions it has become the settled doctrine of this court that affidavits used upon a hearing before the trial court cannot here be considered, unless by the certificate of the trial judge they are made a part of the record by being included in the statement of facts or a bill of exceptions. It is not sufficient that they may be found in the clerk's transcript. *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873; *Haines & Spencer v. Kelley*, 57 Wash. 219, 106 Pac. 776; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Spoar v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627; *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190; *Hale v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837; *State v. Moran*, 66 Wash. 588, 120 Pac. 86; *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984; *Gazzam v. Zimmer*, 68 Wash. 41, 122 Pac. 366; *State v. Rice*, 72 Wash. 104, 129 Pac. 911; *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Powers v. Washington Portland Cement Co.*, 79 Wash. 1, 139 Pac. 615; *Agens v. Powell*, 79 Wash. 131, 139 Pac. 873; *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Norton v. Pacific Power & Light Co.*, 79 Wash. 625, 140 Pac. 905; *Congdon v. Aumiller*, 79 Wash. 616, 140 Pac. 912.

But it is claimed that the reference to the affidavits in the statement of facts is sufficient to make them a part thereof. Rem. & Bal. Code, § 390 (P. C. 81 § 687), provides:

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"Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof."

This section requires that depositions or other written evidence shall not only be referred to in the proposed bill or statement, but shall be attached thereto in order that they may become a part thereof. That "other written evidence" includes affidavits will hardly be disputed. Rem. & Bal. Code, § 395 (P. C. 81 § 697) provides what shall constitute a part of the record without being included in the statement of facts and may be embodied in the clerk's transcript. Affidavits are not covered by this section. It seems reasonably plain that reference in the statement of facts to affidavits on file is not sufficient to make them a part of the record, even though it is provided therein that "the same are hereby made a part hereof."

As supporting the position that the reference is sufficient to constitute affidavits a part of the record, the appellant cites, *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667, 52 Pac. 246; *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692. In the *Pennsylvania Mortgage Inv. Co.* case, the motion to strike the statement was on the ground that the exhibits which had been introduced in evidence were not contained in the proposed statement. They were in fact attached to the statement as certified by the trial judge, and made a part thereof. In the *O'Neile* case, the motion was to strike from the statement of facts copies of a deposition and copies of certain exhibits. There was no claim that these copies were incorrect. The originals were not attached. It was there said:

"The statement in question does in fact contain purported copies of the 'written evidence' in the case, including the deposition and exhibits mentioned in respondents' motion; and the statement itself shows that some, if not all, of the copies of the writings objected to by respondents were expressly per-

mitted by the court, at the trial, to be filed instead of the originals."

In each of those cases, the motion to strike was denied. The holding in neither supports the appellant's contention here. In one, the deposition and copies of exhibits were actually attached to the statement, and by the certificate of the trial judge made a part thereof. And in the other, copies were set out in the statement. In this case, the affidavits were neither attached to the statement of facts, nor were copies thereof attached or set out therein. To hold that reference to the affidavits is sufficient it would be necessary to disregard § 390 of Rem. & Bal. Code (P. C. 81 § 687), which requires that they shall not only be referred to, but that the same shall be attached to the bill or statement of facts. It follows, therefore, that the motion must be granted.

Since we are unable to consider the affidavits upon which the court's order vacating the sale was based, it cannot be said that the trial judge committed error in entering the order.

The judgment will be affirmed.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 11698. Department Two. June 30, 1914.]

L. S. BEACH, *Appellant*, v. THE CITY OF BELLINGHAM,
Respondent.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—NOTICE—STATUTE—APPLICATION. Provisions of a city charter of the first class with reference to the publication of notice of proposed improvements do not apply to proceedings under 3 Rem. & Bal. Code, § 7892-1 *et seq.*, in view of Id., § 7892-67 making the act applicable to all cities, and § 7892-71 providing that the act shall supersede the provisions of the charter of any city of the first class inconsistent therewith.

SAME—ASSESSMENTS—LIMITATIONS—SEPARATE IMPROVEMENT. Where a resolution and ordinance for the clearing, grading and curbing of a certain street were within the statute as to the maximum cost, they are not invalidated by the adoption, on the same day, of a resolution and ordinance for paving the same street, the combined cost of the two improvements exceeding the maximum cost allowed by law, where the later improvement was held illegal and the ordinance therefor subsequently repealed.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 13, 1913, upon findings in favor of the defendants, denying injunctive relief against a public improvement, after a trial to the court on the merits. Affirmed.

Henry C. Beach, for appellant.

Dan F. North, for respondent.

FULLERTON, J.—On March 10, 1913, the city council of the city of Bellingham passed a resolution declaring its intention to order the improvement of certain streets in that city. The resolution was in form and substance such as is provided for in 3 Rem. & Bal. Code, §§ 7892-1 to 7892-72. The resolution described the improvement to consist of "clearing, grubbing, grading and constructing concrete curbs and gutters, roadway to be 24 feet in width between curbs, together

¹Reported in 141 Pac. 703.

with concrete sidewalks where necessary, and making the necessary provisions for drainage of the same."

Later on in the same evening, the city council passed another resolution, similar in form and substance to the first, declaring its intention to improve the streets described in the first resolution, by "paving the same with asphalt on a concrete base, or other suitable pavement, the full width between the proposed curbs." The resolutions were published for two consecutive weeks in the official newspaper of the city of Bellingham, as directed by the statute. Prior to the time fixed for the hearing, an estimated cost of each proposed improvement, together with the assessed value of the property within the improvement district and a diagram or plat showing the lots and blocks which would be specially benefited thereby, was prepared and filed with the city council by the proper officer. This return showed that the assessed value of the property within the district was \$47,202, and that the estimated cost of the improvement proposed by the first resolution was \$19,500, and the second \$15,400. Protests against the proposed improvements were filed by property holders residing within the district, which protests were overruled by the council at the hearing held on the day fixed therefor.

On the same evening, ordinances were introduced, and read the first and second times, providing for the improvements in accordance with the resolutions, the ordinance relating to the first resolution being introduced first, and numbered 1970, the other subsequent thereto and numbered 1971. Both of the ordinances were passed in the order of their introduction at a subsequent meeting of the city council, held on April 28, 1913, were approved by the mayor on the same evening, and afterwards duly published for the required period.

The present action was begun on May 27, 1913, to enjoin the city from proceeding with the improvement of the streets under the resolutions and ordinances mentioned. Issue was taken on the complaint, and a trial had, which resulted in a judgment of the court enjoining the city from making the

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improvement contemplated by the second resolution and ordinance, but denying the injunction as to the first. After the entry of the judgment, the city accepted it as a final determination of its rights in the premises, and subsequently repealed the second ordinance. The plaintiff in the action appeals.

The first three assignments of error relate to the sufficiency of the publication of the notice of intention to improve the street. It is not denied that the notice was published in strict conformity with the statute, but it is said that the city charter requires publications of this character to be made in the city official paper for five successive issues, and that the charter provisions, in so far as they are applicable, control the action of the city officers in making public improvements rather than the provisions of the statute. But, without specially reviewing its provisions, we think the statute before cited was intended to furnish in itself a complete scheme for making public improvements by the different municipalities of the state, and that any such municipality is at liberty to pursue it, even though it may have in its own charter and ordinances a distinct and separate scheme for that purpose. It provides (in § 7892-67) that the provisions of the act shall apply to all incorporated cities and towns in the state, including unclassified cities and towns operating under special charters, and (in § 7892-71) that the act shall supersede the provisions of the charter of any city of the first class (the class to which the city of Bellingham belongs) inconsistent therewith. It is not necessary here to decide whether a city of the first class may now proceed under its charter and ordinances in making a public improvement in disregard of the provisions of the statute, but it is clear that any such city may proceed in so doing under the statute, and that its procedure, if the provisions of the statute be followed, will be legal and valid, regardless of the question whether such procedure is in compliance or in conflict with its charter and ordinances. It fol-

lows that the publication of the resolution of intention in the present instance was legally sufficient.

The statute (§ Rem. & Bal. Code, § 7892-12) fixes a limitation at which benefited property in an assessment district may be assessed for the cost of a public improvement at fifty per centum of its value, exclusive of improvements thereon, according to the valuation last placed thereon for purposes of general taxation. *Van Der Creek v. Spokane*, 78 Wash. 94, 138 Pac. 560. It will be observed, from an examination of the figures before given, that, while the cost of the first contemplated improvement is well within the limit of the prescribed per centum, the combined cost of the two improvements exceeds that per centum. It was on this ground that the trial court held the procedure relating to the second contemplated improvement invalid. It held that a city could not make a second improvement upon a street, when the cost thereof added to the unpaid cost of the first improvement exceeded the maximum cost the statute permitted to be expended in the improvement of the street. The appellant argues that, if this holding is sound, it is so on the principle that the two proceedings are one in law, and being one in law it must follow that, if it is invalid in part, it is invalid in its entirety. But we think that the premise here assumed is not warranted by the facts. While the one proceeding followed closely upon the other, the proceedings in themselves were entirely separate, as much so as they would have been had the first been completed before the other was initiated. The first is within the statute both as to its regularity and as to its maximum of cost. It is therefore a valid procedure, and could not be rendered invalid by any subsequent act of the city looking to the placing of an additional improvement on the street. We need not, of course, inquire on this hearing into the soundness of the conclusion that the second proceeding is invalid. Since we hold the first proceeding within the statute, the appellant is in no way aggrieved by the judgment entered. The city could complain

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but it has accepted the judgment, and only the party aggrieved has the right of appeal.

The judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and MORRIS, JJ., concur.

[No. 11700. Department One. June 30, 1914.]

G. N. SKINNER, *Respondent*, v. GRIFFITHS & SONS,
Appellant.¹

SALES—DELIVERY—WHEN TITLE PASSES—"F. O. B. SCOW." Delivery of 5,000 herring boxes pursuant to the terms of sale, "f. o. b. scow" at Seattle, "alongside of the barge L.", operates *ipso facto* to pass the title to the purchaser, who thereafter assumes the risk of loss, if the articles corresponded to the terms of the contract and there was no stipulation making inspection a condition precedent.

SALES — WARRANTY — PERFORMANCE — EVIDENCE — SUFFICIENCY. Where part of 5,000 herring boxes were lost from a scow, and substantially half were recovered and found to conform to the terms of the contract of sale, the presumption is that all the boxes lost were of the same kind, and conformed to the contract.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 3, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Trefethen & Grinstead, for appellant.

Hastings & Stedman, for respondent.

GOSE, J.—This is an action to recover the contract price for 5,000 knocked-down herring boxes. The cause was tried to the court, and terminated in a judgment for the plaintiff. The defendant has appealed.

The contract, which was in the form of a confirmatory letter addressed to the appellant, is, omitting immaterialities, as follows:

¹Reported in 141 Pac. 693.

"Seattle, Wash., Nov. 18, 1912.

"Wish to acknowledge your verbal order of this morning for 5000 knocked down herring boxes . . . No. 1 Com Rgh . . . To be tied in bundles and delivered f. o. b. scow Winslow or Seattle, by November 30. . . . For your information we wish to state that No. 1 common grade calls for even thickness of lumber, and you may depend that these boxes will be up to grade. . . ."

The appellant, on the same date, in a letter addressed to the respondent, said: "We have your favor of this date confirming arrangement for 5,000 knocked down herring boxes, which is all in order." A few days later, the appellant directed the respondent to deliver the scow in the harbor at Seattle "alongside of the barge Louisiana." The scow, loaded with boxes which conformed to the agreement, was delivered alongside the barge Louisiana in the harbor at Seattle, and made fast to the barge by the latter's ropes a few minutes before five o'clock on Saturday, November 30, and the appellant was promptly advised of the delivery. Nothing was done in the way of unloading the scow until Monday morning, December 2, when it was found that the scow had settled and that the larger part of the boxes had been washed away.

The concrete question presented is, Did the title pass when the boxes were delivered at the place and in the manner agreed upon, in the absence of a stipulation making inspection a condition precedent to the passing of the title? In determining whether title has or has not passed by the contract, the primary consideration, under all of the authorities, is one of intention. *Pacific Lounge & Mattress Co. v. Rudebeck*, 15 Wash. 336, 46 Pac. 392; *Lauber v. Johnston*, 54 Wash. 59, 102 Pac. 873. The term f. o. b. scow at Seattle, means that the goods shall be delivered free on board the scow at Seattle, that is, delivered on board the scow at Seattle without expense to the purchaser. *Menz Lumber Co. v. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. (N. S.) 1007. We think the better rule is that a delivery of the article agreed upon, at the place and

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in the manner agreed upon, operates *ipso facto* to pass the title to the purchaser. The buyer has a reasonable time after the delivery in which to examine the goods, and if they are not of the kind and quality ordered, he may then refuse to accept them, "but this right does not prevent the title from passing nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract: Tiedeman on Sales, § 112; *Brigham v. Hibbard*, 28 Ore. 386, 43 Pac. 383." This view is supported by *Murphy v. Sagola Lumber Co.*, 125 Wis. 363, 103 N. W. 1113. It was there held that, where the article sold has been delivered at the place and in the manner agreed upon, the title passes to the purchaser, and that the article sold is thereafter at the risk of the purchaser "if it corresponded in quality with the provisions of the contract." See, also, *Izett v. Stetson & Post Mill Co.*, 22 Wash. 300, 60 Pac. 1128; Williston, Sales, p. 358, rule 5, and p. 402. On the page last cited, the learned author thus states the rule:

"If the seller conforms to the authority given him, the property passes and the buyer's subsequent inspection merely enables him to satisfy himself that because the authority given the seller was properly exercised the property passed."

The appellant has cited *Lauber v. Johnston*, *supra*. In that case there had been a sale of "all the merchantable hay" on the ranch to the seller. The hay was destroyed by fire after a portion of it had been baled and accepted. The stacks contained both merchantable and unmerchantable hay. Upon these facts, we held that the title to the hay remained in the seller until it was separated and baled. The appellant has also cited *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687, which seemingly supports his contention. We think, however, that the view we have announced is the sounder one. If the appellant desired to make inspection a condition precedent to the passing of the title, it should have so stipulated in the contract.

It is also contended that the loss of the boxes was due to

the negligence of the respondent, in that the hatches were not battened and that the scow was unseaworthy and leaked. These are questions of fact which the court resolved against the appellant upon abundant competent testimony. The testimony is that there was a high wind in the early morning of December 2, and that it was blowing above thirty miles an hour from one o'clock in the morning. The wind reached its maximum about 7:51 that morning, when it was blowing forty-three miles an hour.

It is also argued that there is no proof that the lost boxes were of an even thickness. This position is not tenable. Four hundred and ninety-five bundles were taken off the scow. The respondent's agent testified that, including these boxes, twenty-eight hundred and seventy-one boxes were recovered and actually delivered to the appellant. The appellant concedes that it received twenty-one hundred and one boxes, made up of salvage and the boxes that were upon the scow. The testimony shows that these boxes conformed to the contract. There is no testimony to the contrary. This clearly made a *prima facie* case. If substantially one-half of the boxes were recovered and received by the appellant and conformed to the contract, the presumption is that the boxes lost were of the same kind.

The respondent was also allowed to recover an item for salvage. We cannot say, in the light of the testimony, this recovery was not proper.

The judgment is affirmed.

Crow, C. J., and MAIN, J., concur.

ELLIS, J. (concurring).—I concur in the result, but not upon the ground given in the opinion. The confirmatory letter which is set out in the opinion contains the following language:

"For your information we wish to state that No. 1 common grade calls for even thickness of lumber, and you may depend that these boxes will be up to grade . . ."

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Concurring Opinion Per ELLIS, J.

This was, in my opinion, an express warranty that the boxes would be up to the grade so defined. This warranty would survive acceptance and use of the boxes by the purchaser. An action for damages thereon could be maintained by the purchaser in case he discovered after acceptance or use that the boxes did not conform to the warranty. No inspection prior to acceptance was incumbent upon the purchaser. Hence, under any view of the matter, the title passed upon delivery in the manner and at the place specified in the letter and more particularly specified by the purchaser "alongside of the barge Louisiana." Had the sale been subject to inspection, a very different question would have been presented, and no title would have passed until a reasonable time for inspection had elapsed, or until a waiver of the right to reject by an acceptance, without inspection. *Hurley-Mason Co. v. Stebbins, Walker & Spinning*, 79 Wash. 366, 140 Pac. 381; *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 79 Wash. 361, 140 Pac. 394. The foregoing are antithetical cases illustrating the two principles. The first is an example of a sale subject to inspection by given tests, upon which the remedy for failure to meet the tests did not survive acceptance. It was waived by failure to inspect or test. The second was a sale with express warranty on which the remedy did survive acceptance, though the defect might have been discovered by physical inspection. In the case here, the sale being on a warranty and not subject to inspection, it seems to me the title passed upon delivery alongside the barge Louisiana.

[No. 11749. Department Two. June 30, 1914.]

**M. C. LIPSCOMB *et al.*, Appellants, v. EXCHANGE NATIONAL
BANK OF SPOKANE *et al.*, Respondents.¹**

APPEAL—REVIEW—HARMLESS ERROR—AMENDMENTS. Upon a trial *de novo* of a cause tried on the merits to the court, the supreme court will consider all proper amendments to the pleadings as made.

SAME—REVIEW—HARMLESS ERROR—EVIDENCE. Upon a trial *de novo*, the supreme court will consider the cause as if improper evidence had been excluded below, the admission of which is therefore harmless.

MECHANICS' LIENS—ACTIONS—PAYMENT. In an action to foreclose mechanics' liens, where an architect and another had agreed to take for their services a certain proportion in cash and the balance in interest bearing obligations issued by the corporation on the faith of the enterprise, they cannot assert nonpayment through the fault of the promoters, when the enterprise failed because of its impracticability, and not on account of the fraud or neglect of the promoters; as they must be held to have assumed the risk of such failure.

MECHANICS' LIENS—PROPERTY SUBJECT—ARCHITECTS—FAILURE TO BUILD. An architect, preparing plans for a building which was not constructed, cannot claim a lien upon the premises.

MECHANICS' LIENS—PRIORITY—PRIOR MORTGAGE. Under Rem. & Bal. Code, § 1130, the lien of a prior mortgagee is inferior to the claims for mechanics' liens.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 22, 1913, upon findings in favor of the defendants, in an action to foreclose mechanics' liens, after a trial to the court. Affirmed.

Tustin & St. Morris and *Mark F. Mendenhall*, for appellants.

Cullen, Lee & Matthews, for respondents Exchange National Bank *et al.*

A. E. Barnes, for respondents Rice *et al.*

E. L. Rice, in *propria persona*.

¹Reported in 141 Pac. 686.

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Opinion Per Curiam.

PER CURIAM.—On October 1, 1909, one Peter Edwall owned certain real property, situated in the city of Spokane, and on that day entered into a contract to sell the same to J. B. Ingersoll for the sum of \$7,250. Ingersoll paid \$1,250 on account of the purchase price of the property at the time of the execution of the contract, and on November 2, 1910, paid \$3,000 more, together with the interest then accrued. The contract between the parties was in writing, and was placed in escrow with The Exchange National Bank of Spokane. Ingersoll subsequently assigned his interest in the contract to one Ona B. McNeill, delivering to her a warranty deed for the premises, which was also delivered to the bank to be held by it until the remainder of the purchase price should be paid. McNeill then owed the bank \$1,250, and to secure this sum, made to the use of the bank a general assignment of all her interest in the property. On June 9, 1911, McNeill conveyed her interests to R. M. McLaughlin by warranty deed; subject to the payment of the balance of the original purchase price and her obligation to the bank of \$1,250, which sums the purchaser assumed and agreed to pay. Subsequently and on August 31, 1911, McLaughlin assigned his interest in the property to H. C. Rice, together with his interests in the papers held by the bank in escrow, and directed the delivery of the same to Rice upon the payment of the balance of the purchase price and the sum due the bank from McNeill. On September 28, 1911, Rice represented to the bank that he was not able to pay the \$3,000 due the original vendor, and solicited the bank to pay the same, and take a deed to itself to the property, promising and agreeing to pay the sum advanced and the further sum of \$1,250 owing to it by McNeill. The bank agreed to and did thereupon take up the title to the property, paying therefor the sum of \$3,000. Later on, Rice and wife executed their note to the bank for \$4,250, being the sum paid the original owners of the property, plus the sum of \$1,250 owing it by McNeill; it being agreed between the parties that

the bank should hold the title to the property as security for the payment of the note.

Rice procured the property for the purpose of erecting thereon an apartment house. In the promotion of this scheme, he, with certain associates, organized a corporation, and Rice conveyed to the corporation his interests in the property. The plan adopted to finance the enterprise is not made clear by the record—at least, we have been unable to gather it more than generally from the abstract—but it seems the corporation issued some form of interest bearing obligations, which were secured by the property conveyed to it. Work was started on the building, but before the excavation for the basement was completed, the laborers thereon ceased work because of nonpayment of their wages, and the scheme was subsequently abandoned.

The appellants M. C. Lipscomb, Charley Lipscomb, and William Bass were among those who had performed labor in the excavation of the basement, and who were only partially paid for their services. To secure the remainder, they filed liens upon the property. The appellants Mitchell and Levesque also filed liens on the property, the former claiming to have performed services in the excavation of the basement, and the latter claiming to have performed services as an architect in drawing plans for the building proposed to be erected.

The present action was brought to foreclose these several liens. The complainants made parties to the action all persons who appeared of record to have an interest therein, and alleged that their liens were first and superior to the liens and claims of the respondents.

The respondents Rice and the Rice Apartment Company answered, denying the claim of lien by the appellants Mitchell and Levesque, and pleading payment of all services rendered by them upon the property. By further and separate answers, they alleged that the appellant Mitchell entered into a contract with the Rice Apartment Company for

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the construction of the apartment building, by the terms of which he agreed to protect the company against the liens of all persons who should labor thereon, or furnish materials for the construction thereof, and prayed judgment against him for any sum that should be adjudged against the company on account of the liens of Lipscomb, Lipscomb and Bass. The Exchange National Bank also answered, in which it denied the allegations of the complaint to the effect that the appellants' liens were first and superior liens on the property, but alleged, on the contrary, that it had a first and superior lien on the property for the amount of the obligation due it from Rice, and by a cross-complaint prayed a foreclosure of its lien. The affirmative matter in the answers were put in issue by replies. After a trial, the court found in accordance with the affirmative allegations of the answers of the respondents. It found that the claimants Mitchell and Levesque had been fully paid for their services; that the claim of the bank for the money advanced for the use of Rice was a superior lien on the property to the liens of each of the appellants Lipscomb, Lipscomb and Bass, and entered a decree of foreclosure, ordering the property to be sold and the proceeds applied, first, in satisfaction of the lien of the bank, and second, in satisfaction of the liens of Lipscomb, Lipscomb and Bass, the appellants, pro rata.

Some fifty-three errors have been assigned on the appeal, but we find it unnecessary to notice them in detail. Many of them relate to the rulings of the court made in settling the issues, and to the admission of evidence at the trial. But, as we have often said, errors of this sort can seldom furnish grounds for reversal on an appeal from a judgment entered in a cause tried on its merits by the court when sitting without a jury. In considering such a cause in this court, we are required by statute to treat all amendable defects in the pleadings as if proper amendments had been made, and if improper evidence has been introduced to exclude such evi-

dence, and consider the cause as if such improper evidence was not in the record. Errors of this sort are material in this court only when it appears that no possible cause of action can be stated upon the facts shown, or when it appears, after excluding the improper evidence, nothing remains upon which to support a judgment in favor of the party having the affirmative of the issue. It avails nothing, therefore, to point out mere error in these particulars; the complainant must go further and show that, because of the errors committed, a different judgment is required from that entered by the court. The errors complained of in this regard in the present case do not go to that extent. The facts plainly show an existing cause of action, and the only material question is, do the facts shown by the legitimate evidence support the judgment.

Turning to the question of the sufficiency of the evidence, it is first contended that there is not sufficient evidence to justify the finding that the claimants Mitchell and Levesque had been fully paid for their services. These parties performed the services for which the liens are claimed under a special contract. They agreed to take therefor a certain proportion in cash and a certain proportion in the interest bearing obligations issued by the corporation. The evidence shows that they received payment in this form in the proportions agreed upon, but the claim now is that they ought not to be held to the contract in so far as it related to the interest bearing obligations, since the enterprise failed of completion, not through the fault of themselves, but through the fault of the promoters of the enterprise. But we think this is not a sufficient reason for holding the contract nugatory. They were bound to know that any enterprise, especially one dependent for its success on the ability of its promoters to sell securities to the public, is possible to fail of success, and knowing this they must be held to have considered the chances of failure when entering into their con-

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tracts. Had it been shown that the failure was the result of fraud, or inattention to the business, on the part of the promoters, a different question would be presented. But there is nothing of this sort in the record. The failure, so far as it appears, was the result of the impracticability of the scheme itself, not because of the fraud of the promoters or want of effort on their part to carry it into effect.

Levesque, however, claims that he was entitled to a much larger sum under his contract than was paid him, and that it was error to deny him the right of recovery for this excess sum. He claims that he was entitled to a lien on the land for the full amount he would have earned had the building been completed. He cites *Gould v. McCormick*, 75 Wash. 61, 134 Pac. 676, as maintaining this position. But in that case the building was completed. It is not the rule that an architect who prepares plans and specifications for a building which is not erected may claim a lien for such services upon the land on which it was contemplated erecting the building. The law contemplates that the lien is to attach to the building, and upon only so much of the land as may be necessary for its use and occupation. In other words, the lien attaches to property which the service has aided in producing. Where, therefore, the building contemplated has not been erected, no lien for the architect's services in drawing plans can attach to specific property. *Rinn v. Electric Power Co.*, 3 App. Div. 305, 38 N. Y. Supp. 345; *Buckingham v. Flummerfelt*, 15 N. D. 112, 106 N. W. 403; *Price v. Kirk*, 90 Pa. St. 47; *Rush v. Able*, 90 Pa. St. 153.

It is next contended that the court erred in holding the liens of the claimants Lipscomb, Lipscomb and Bass, inferior to the lien of the Exchange National Bank. But we find no error in this holding. The bank stood in the position of a prior mortgagee of the premises, and by the express terms of the statute, a lien for labor attaches only to the interest of the person or company who causes the labor to be performed.

Rem. & Bal. Code, § 1180 (P. C. 309 § 57); *Baker v. Sinclair*, 22 Wash. 462, 61 Pac. 170; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333, 78 Pac. 996.

Other errors assigned require no special consideration. The judgment is affirmed.

[No. 11892. Department One. June 30, 1914.]

REGINALD POTTS, *Respondent*, v. JOHN FORTUNE, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—COMMON EMPLOYMENT. A teamster and his helper are fellow servants, where they were engaged in transferring from another wagon to the plaintiff's wagon a heavy steel shaft, which fell and injured plaintiff.

MASTER AND SERVANT—NEGLIGENCE—QUESTION FOR JURY. Whether a teamster's helper was guilty of negligence in releasing his hold on the end of a steel shaft without notifying the teamster, is a question for the jury, where there was room for a reasonable difference of opinion.

SAME—EMPLOYMENT OF INCOMPETENT FELLOW SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A master is not negligent in employing a teamster's helper, where, before hiring him, he inquired of his former employer as to his qualifications and was assured that he was a good man; the employment being simple.

SAME—NOTICE OF INCOMPETENCE. A master is not negligent in retaining in his employ a teamster's helper, engaged in simple work, who was recommended by his former employer, merely on account of notice that he was quick and hasty in his actions, and where, on complaint made, no promise was given that he would be discharged.

Appeal from a judgment of the superior court for King county, Humphries, J., entered October 10, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a teamster. Reversed.

Chas. E. McAvoy, for appellant.

Jay C. Allen, for respondent.

¹Reported in 141 Pac. 697. •

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Opinion Per ELLIS, J.

ELLIS, J.—Action for personal injuries. The defendant was engaged in the transfer business in the city of Seattle. The plaintiff was in his services as a teamster from July, 1912, to early in September, 1912. On Wednesday, August 21, 1912, the defendant employed one George as teamster's helper. This employment was only temporary, pending the arrival of a man whom defendant had employed regularly for that work. It began at noon of August 21, and continued for the next three or four days. One Sayre, who was doing business as the Georgetown Reliable Transfer Company, for whom George had worked for short periods from time to time during the previous three or four years, upon inquiry by the defendant, recommended George as a good man, and sent him to see the defendant. On August 22, the plaintiff and this man George were transferring, from another wagon to the wagon of which the plaintiff was the driver, a steel shaft, a fraction under two inches in diameter, twenty feet long, and weighing 167 pounds, one of the men standing at either end. The evidence tended to show that George released his end of the shaft prematurely, causing the plaintiff to catch his right hand between the shaft and the sideboard on the wagon, crushing the middle finger. The plaintiff continued to work until September 3, when, infection having developed, he went to a doctor, and subsequently to a hospital. The finger was subjected to several operations, and was finally amputated at the second joint.

The negligence charged was that the man George was unfit and incompetent for, and inexperienced in, the work of a teamster's helper, of which the defendant had notice and had previously been informed, but, notwithstanding such knowledge, retained the man George in his employ and sent him to assist the plaintiff in doing the work in which he was injured. The answer denied any knowledge on the defendant's part that George was incompetent or inexperienced, and affirmatively alleged that the defendant, prior to employing George, made inquiry of his former employers, and was informed that

he was, in fact, an experienced teamster's helper, thoroughly competent, being a man of about 29 years of age, and mentally and physically normal. The answer also interposed the affirmative defenses of injury by negligence of a fellow servant, plaintiff's negligence contributing to the original injury, and that the amputation of the finger was caused by the negligence and carelessness of the plaintiff after the original injury was received. These affirmative defenses were traversed by the reply. When the evidence was all in, the defendant moved for an instructed verdict in his favor, which motion was overruled. The jury returned a verdict for the plaintiff in the sum of \$352.50. The defendant moved for a judgment notwithstanding the verdict, and, in the alternative, for a new trial. These motions were also overruled, and judgment was entered upon the verdict. The defendant appealed.

It is conceded, as, of course, it must be, that the plaintiff and George were fellow servants. *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389. Whether the helper, George, was guilty of negligence in prematurely releasing his end of the shaft without warning was a question for the jury. There was evidence that, in such work, it is customary for the driver to take the lead in the work and notify his helper when to let go, and if the helper, for any reason, finds it necessary to release his hold before such notice, he should notify the driver in order to avoid injury. Whether the admitted failure to do so in this instance was negligence on the helper's part is a question upon which there might be reasonable difference of opinion. In such a case, the question is always one for the jury.

The only remaining question in this case is whether the appellant was negligent in employing and retaining in his service an incompetent helper. This question, as in every other phase of negligence, is one of ordinary care, which implies only that degree of care and precaution which the exigencies of the particular service reasonably require. *Wabash R.*

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Co. v. McDaniels, 107 U. S. 454; *Emery v. Tacoma*, 71 Wash. 132, 127 Pac. 851. Labatt states what we conceive to be the correct rule. After pointing out that a master would not ordinarily be justified in assuming that a person who seeks a position is qualified to fill it, he says:

"It is therefore well established that, where the service in which the servant is to be employed is such as to endanger the lives and persons of coemployees, the master, before engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life. An exception to this rule is admitted where the work is of a simple kind, which anyone of fair intelligence and requisite physical ability is competent to perform. This investigation need not necessarily assume the form of questioning an applicant for work as to his competency. An omission to do this is negligence only when there is no better source of information at hand, and cannot be imputed as culpable where information is sought from the applicant's former employer. On the other hand, the employer's duty is fully discharged if he makes careful inquiry into the habits and competency of the men employed, and upon such inquiry believes, and has good reason to believe, them sober and competent and careful." 3 Labatt, Master & Servant (2d ed.), § 1097.

See, also, *Timm v. Michigan Cent. R. Co.*, 98 Mich. 226, 57 N. W. 116; *Gier v. Los Angeles Consol. Elec. R. Co.*, 108 Cal. 129, 41 Pac. 22. Judged by this rule, it is obvious that the defendant did all that the law required of him in employing the man George. He inquired of his former employer as to his qualifications, and hired him on the assurance that he was a good man. The appellant did not know George. He was in temporary need of a man for the most simple employment. There was nothing unusual or dangerous about it. It was as simple and free from complications as any task in which two men could be required to cooperate. It required no special skill or training, and but little, if any, experience, for its safe and proper performance. It is a matter of common sense which no amount of so-called expert opinion could

either modify or change that the only necessary qualification for such work was normal mental and physical capacity. It is admitted that George possessed both of these. Under the evidence, we are clear that the appellant was guilty of no negligence in his original employment of this helper.

The question remains, did he negligently retain the man after notice of his incompetence? The only evidence that George was in any manner unfit was that of certain teamsters with whom he had worked while in the employ of the Georgetown Reliable Transfer Company, the one who put the matter most strongly testifying, in substance, that he had worked with George as helper when he, the witness, was driving a furniture van; that George was reckless with the furniture; that he was quick and did not pay any attention to the man working with him; that "you have to keep track on him yourself or he will get something broke or get hurt." When asked how a helper should do his work, he answered, "He should be careful, take the work and do it right, and be careful, especially in furniture. You can break up furniture pretty fast if you do not handle it carefully, especially fine furniture; scratch and mar it." There was no evidence that he had ever injured any one or that he had ever come near doing so. There was no evidence that any one had ever seriously regarded him as a man with whom there was any personal danger in working. Assuming, however, that the evidence was such as to take the case to the jury on the question of dangerous incompetence of the helper, we believe, nevertheless, that the evidence of the notice of that fact to the appellant was not such as, under the circumstances to charge him with negligence in retaining George in his employment. The respondent testified that, prior to the accident, he notified the appellant that he had heard George was incompetent; that he did this on two or three occasions, testifying:

"I told him that the drivers for the Georgetown Transfer Company had told me that they would refuse to work with him—that the boys refused to work with him (George);

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that he would do everything in a hurry, and therefore did more damage than good; that he was a sound man and could do lots, but he wanted to do it in a big rush. I was kind of leary of the man myself; I did not want to work with him. Mr. Fortune replied, saying he was all right; I thought Mr. Fortune knew more about it than I did; he was running his business and that if he thought the man was all right, he was all right."

On cross-examination, it clearly developed that, if the respondent spoke of this matter more than once to the appellant, all save the first instance were after the respondent's injury. He testified that the second conversation was on a Saturday evening while George was working for the appellant. The evidence is conclusive that George worked for the appellant only one Saturday, and that was the second day after the injury. The appellant had never known George prior to employing him. The respondent had known of George for some time, but was not personally acquainted with him prior to that time. It is obvious that the respondent's knowledge of George's incompetence, assuming that he was incompetent, was much more specific and certain than that of the appellant even after the first conversation. It is clear from the respondent's own testimony that the appellant gave him no promise to discharge George, nor did he say anything which could have left the impression in the respondent's mind that George would be discharged. Notwithstanding the rumors which the respondent claims to have communicated to the appellant prior to the accident, we think, in view of the simple character of the work, the appellant was justified, as a matter of law, in relying upon the assurance of George's former employer that he was a good man, and retaining him in his employ, in the absence of anything more specific than respondent's information as to his reported hasty character. The case would be different had the respondent remained in the appellant's employment under a promise on the appellant's part to investigate, and, if he found the man incompetent, to discharge him. No such promise having been given,

the respondent assumed whatever risk could be anticipated, by remaining in appellant's employment. True, assumption of risk was not specifically pleaded, but it was developed by respondent's own testimony. The necessity for the specific plea was thus waived. Respondent's negligence in remaining in the employment with his own admittedly greater knowledge than that of the appellant, of the character of the man George was negligence concurring with whatever negligence may be attributed to the appellant in the premises.

This case, as it seems to us, is ruled by the case of *Cavelin v. Stone & Webster Engineering Corp.*, 61 Wash. 375, 112 Pac. 349, both upon the law and the facts. In that case, this court, speaking through Judge Rudkin, said:

"The only evidence offered tending to show the incompetency of Melburg, or knowledge of such incompetency on the part of the master, was some slight testimony to the effect that 'he appeared to be nervous,' 'in a hurry about his work,' and had broken the line and pulled the nail on one or two previous occasions. Such testimony, in our opinion, is utterly insufficient to show incompetency in a common mason or bricklayer. He was not employed to operate or handle dangerous agencies or dangerous machinery, and had only been engaged on this particular work for an hour or two at best before the accident. The duty assigned him was such as falls to the lot of every workman. There was nothing unusual or dangerous about it, and no special skill or experience was requisite to its safe and proper performance. True, there was some testimony tending to show that it required some experience to qualify one to properly perform this simple task, but it is a matter of common knowledge, known to all men, that it requires no peculiar skill or knowledge to qualify one to safely stretch a small line forty feet in length, and so-called expert testimony to the contrary imposes too great a tax on the credulity of either court or jury."

Every view of the case constrains us to hold that the evidence of dangerous incompetence on George's part, and of negligence on the appellant's part, was entirely insufficient to take the case to the jury. To hold otherwise would be, in effect, to render every transfer man, every farmer, and every

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Statement of Case.

person employing two or more men in the most simple and ordinary tasks, an insurer of the safety of his employees against the slightest negligence or haste on the part of co-laborers. Such a rule has never been announced by any court, so far as we are advised. The evidence was wholly insufficient to sustain the verdict.

The judgment is reversed, and the cause is remanded for dismissal.

Crow, C. J., Gose, Chadwick, and Main, JJ., concur.

[Nos. 11643½, 11644. *En Banc*. June 30, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v. NORTHERN
EXPRESS COMPANY, *Respondent*.

THE STATE OF WASHINGTON, *Appellant*, v. GREAT
NORTHERN EXPRESS COMPANY, *Respondent*.¹

COMMERCE—INTERSTATE COMMERCE—REGULATION BY STATE—EXCISE TAX—VALIDITY. Rem. & Bal. Code, §§ 9161-9168, levying an excise or privilege tax upon express companies upon the gross receipts for business done within the state of Washington, refers to business begun and ended within this state, and being a tax upon intrastate commerce only, does not impose a burden upon interstate commerce (overruling on rehearing, Id., 76 Wash. 636).

CARRIERS—EXPRESS COMPANIES—DUTIES—RENUNCIATION OF INTRASTATE BUSINESS—POWER. The state having no power to place a burden upon interstate commerce, an interstate express company doing business in this state is free to renounce its intrastate business, notwithstanding the constitutional and statutory provisions making express companies common carriers subject to state control, and prohibiting discrimination in privileges and transportation charges (overruling on rehearing Id., 76 Wash. 636).

Gose and Chadwick, JJ., dissent.

Appeals from judgments of the superior court for Thurston county, Mitchell, J., entered September 9, 1913, and October 11, 1913, dismissing actions to collect a tax, upon overruling demurrers to the answers. Reversed.

¹Reported in 141 Pac. 757.

The Attorney General and *Stephen V. Carey, Assistant, (John H. Powell, of counsel)*, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte (F. V. Brown, of counsel), for respondent Northern Express Company.

F. V. Brown and F. G. Dorety, for respondent Great Northern Express Company.

MORRIS, J.—The first of these cases was heard by Department One, in November, 1913, and an opinion filed December 13, 1913; 76 Wash. 636, 136 Pac. 1160. A rehearing has been granted, and the case reheard by the court *En Banc*. The second case involves the same question. Accordingly the cases have been consolidated and heard together. The facts will not be restated, except as we find it necessary to refer to them.

As stated in the department opinion, the single question presented by both cases is whether the statute in question is repugnant to the commerce clause of the Federal constitution. The statute, which will be found in Laws 1907, p. 79; Rem. & Bal. Code, §§ 9161 to 9168 (P. C. 433 §§ 73-87), imposes a privilege tax of five per cent upon the gross receipts of express companies for business done within this state. In reaching our conclusion, we may accept certain principles as established: (1) Subject to constitutional limitations, a state has the power to regulate the doing of local business within its borders. *Pullman Co. v. Kansas*, 216 U. S. 56. (2) A state may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. (3) A state has the right to tax property although it is used in interstate commerce. *United States Express Co. v. Minnesota*, 223 U. S. 335. (4) No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on,

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as such taxation is a burden on that commerce and amounts to regulation of it. *Lyng v. Michigan*, 135 U. S. 161. (5) When the business sought to be taxed is wholly within the state and said business is but a mere incident to interstate business, such fact furnishes no obstacle to the valid taxation by the state of the business which is entirely local. So long as regulation as to license or taxation does not refer to, and is not imposed upon, the business which is interstate, there is no interference with interstate commerce. *Osborne v. Florida*, 164 U. S. 650. It might further be asserted that, conceding the right of the state to require a company engaged in both interstate and intrastate commerce to pay a privilege tax upon its purely intrastate or local business, the state could not, in the exercise of such right, impose a burden upon the interstate commerce of such company as a condition to its right to do a local business. As was said in *United States Express Co. v. Minnesota*, *supra*, the difficulty in applying these principles to any given case is to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such.

Referring now to the act, we will set out those sections which are material to this inquiry:

"Sec. 1. Any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver plate or any articles by express service as distinguished from the ordinary freight lines of transportation of merchandise and property in this state, shall be deemed to be an express company." Rem. & Bal. Code, § 9161 (P. C. 433 § 73).

"Sec. 2. Every express company, as defined in section one hereof, doing business in this state, shall annually, between the first and thirtieth day of April, after passage of this act, under oath of the person constituting such company, if a person, or under oath of the president, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file

with the state board of tax commissioners a statement, in such form as the board may prescribe, containing the following facts: . . . 6th. The entire receipts (including all sums earned or charged, whether actually received or not), for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies." Rem. & Bal. Code, § 9162 (P. C. 433 § 75).

"Sec. 3. The state board of tax commissioners shall proceed to ascertain and determine, on or before the first Monday in July, the entire gross receipts of each of said express companies for business done within the state of Washington for the year next preceding the first day of April, and the amount so ascertained shall, in such instances, be held and deemed to be the gross receipts of such express company for business done within the state of Washington for the year under consideration." Rem. & Bal. Code, § 9163 (P. C. 433 § 77).

"Sec. 4. The board may adjourn from time to time until the business before it is finally disposed of. In case of failure or refusal of any express company to make the statement required by law, or furnish the board any information requested by it, the board shall inform itself as best it may on the matters necessary to be known in order to discharge its duty. And at any time after the meeting of the board on the first Monday in June, and before the gross receipts of any express company for business done within the state of Washington are determined, any person, company or corporation interested shall have the right, on written application, to appear before the board and be heard in the matter of such determination. After the determination of the amount of the gross receipts of any express company for business done in the state of Washington and before the certification of the state board of tax commissioners of such amount, the board may, on the application of any person, company or corporation interested, or on its own motion, review and correct its findings, in such manner as may seem to it to be just and proper." Rem. & Bal. Code, § 9164 (P. C. 433 § 79).

"Sec. 7. The state board of tax commissioners shall on the first Monday in August, annually, enter the amount of gross receipts of express companies doing business in this state, for the year then next preceding the first day of April,

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as determined as provided for in section three of this act in a book provided for that purpose. It shall be the duty of the state treasurer, annually, to collect from each such express company, doing business in this state, a sum in the nature of an excise or privilege tax, to be computed by taking five per centum of the amount fixed by the state board of tax commissioners as the gross receipts of such express company for business done within the state of Washington for the year next preceding the first day of April, as determined and certified by the state board of tax commissioners: Provided, Nothing contained in this act shall exempt or relieve any express company from the assessment and taxation of their tangible property in the manner authorized and provided by law. All taxes collected under the provisions of this act shall be credited to the state general fund. . . .” Rem. & Bal. Code, § 9167 (P. C. 433 § 85).

We cannot find that this statute is repugnant to any of these principles. Its whole import, as we read it, is to impose a tax on local business “done within the state of Washington.” Commerce that is confined and limited to “business done within the state of Washington” has within it no shade or element of interstate commerce. Neither is there any attempt in the imposition of this tax on local business to impose any burden or condition upon the right of the express companies to do an interstate business within this state. The phrase “gross receipts of such express company for business done within the state of Washington,” to which the tax is alone applicable, is an expression of the legislative intent to limit this tax to business wholly within this state; that is, business begun and ended within this state. Business begun within this state and ended within another state, or begun in another state and ended within this state, or transacted partly within this state and partly within another state, which would be one way of defining interstate commerce, is not business done within this state, and a tax confined to the gross receipts of the business done within this state is a tax upon intrastate and not upon interstate commerce. Upon this point, the case of *Pacific Express Co. v. Seibert*, 142 U. S. 339 (not cited

in the original briefs and hence not referred to in the department opinion) is so instructive that we refer to it at length. The act there reviewed, upon a contention that it was invalid as imposing a burden upon interstate commerce, is so similar to our act that, so far as their essential features are concerned, they may be said to be the same. The act is set forth in full in the opinion. It provides, in short, that every express company doing business within the state of Missouri shall annually deliver to the state auditor a statement showing the entire receipts from business done within the state, and shall pay into the treasury of the state the sum of two dollars on each one hundred dollars of such receipts. The act was attacked on various grounds, among them the one here raised. In deciding this point the court said:

"Was the business of this express company in the state of Missouri, on the receipts from which the tax in question was assessed under this act, interstate commerce? The allegation of the bill is very positive that in the prosecution of its business as an express company the complainant is engaged, in part, in the transportation of goods and other property between the states of Nebraska, Kansas, Texas and other states of the Union and the state of Missouri; and also in the business of carrying goods between different points within the limits of the state of Missouri. The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its *intra-state* business. We think a proper construction of the statute confines the tax which it creates to the *intra-state* business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done *within this state* of each agent of such company doing business *in this state*,' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats *within this state* for the transportation of their freight *within this state*' may be deducted from the gross re-

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ceipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done *within this state*,' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the state of Missouri, expressly limit the tax to receipts for the sums earned and charged for the *business done within the state*. This positive and oft-repeated limitation to business done within the state, that is, business begun and ended within the state, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within this state' cannot be made to mean business done between that state and other states. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

We confess our inability to distinguish the *Seibert* case from the one before us, and inasmuch as it is a decision upon a Federal question, it is decisive of these appeals. See, also, the same case, 44 Fed. 310.

The latest decision of the supreme court of the United States dealing with a like question is *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576, and subsequent to the argument herein. The state of Ohio passed an act requiring each railroad doing business within that state to file a statement setting forth its entire gross earnings derived from business done within that state, excluding therefrom all earnings derived wholly from interstate business, and providing that such gross earnings should be charged with an excise tax of four per cent for the privilege of carrying on its intrastate business. It was insisted, on attacking the act, that, as applied to railroads, it was a burden upon interstate commerce, this contention being raised upon the provision of the act for ascertaining the earnings of the railroads "from whatever source

derived, for business done within this state, excluding therefrom all earnings derived wholly from interstate business," the argument being that this has the effect of imposing a tax with respect to the gross receipts from foreign commerce because such commerce is not expressly excepted. This contention was overruled, the court holding that the intent of the act was plain, to measure the tax only upon earnings from intrastate business, and on this view the act was sustained. The language of the Ohio act, in "excluding therefrom all earnings derived wholly from interstate business" is no clearer enunciation of the intent of the act to subject intrastate business to the payment of the tax than is the language of our act in measuring the tax upon "business done within the state of Washington," since interstate commerce is in no sense business done within the state of Washington. Nor can it be classified as such. The two expressions convey an identical meaning—to limit the operation of each act to purely local business, and to exclude from its operation any and all business that could be included within any definition of interstate commerce.

The respondents, while citing a number of other cases, relied principally upon *Pullman Co. v. Adams*, 189 U. S. 420, and *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, as sustaining their contention that the tax created by this statute imposed a burden upon interstate commerce; and since these cases were cited by the department as sustaining the conclusion reached by it, we have given them careful consideration, and such consideration leads us to now say we can find nothing in either of those cases which would render these taxes invalid. The *Adams* case may best be referred to as read by the court itself in *Western Union Tel. Co. v. Kansas ex rel. Attorney General*, 216 U. S. 1:

"As to *Pullman Co. v. Adams*, 189 U. S. 420, 429, we perceive nothing in the judgment in that case that conflicts with what is herein said. That case involved the validity of a tax of a certain amount imposed by Mississippi on each

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sleeping and palace car company carrying passengers 'from one point to another *within the state*,' and so many cents per mile 'for each mile of railroad track over which the company runs its cars *in this state*.' It was contended that this tax was an interference with commerce among the states. It is stated in the opinion that the sleeping cars of the Pullman Company, an Illinois corporation, 'were carried by various railroad companies, and all of them were carried into the state from another state, or out of the state to another state or both. But such cars in their passage also carried passengers from point to point within the state, and a specific fare was collected by the servants of the Pullman Company.' It was contended by the company that the state constitution made it a common carrier, and, in effect, compelled it to assume the burden of carrying local passengers, although its receipts from purely local business were less than the expenses incurred in carrying it on. But the state supreme court held that view of the state constitution to be fallacious. And this court said: 'If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume, without discussion, that the tax would be invalid. *For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in Crutcher v. Kentucky*, 141 U. S. 47. On the other hand if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida*, 164 U. S. 650. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax. As the validity of the tax is thus bound up with the effect of the section of the state constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the constitution of Mississippi should be read as imposing an obligation to take

local passengers, the question for us might be which, if not both, the clause of the constitution or the tax act is invalid. But we assume that the opinion of the supreme court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the supreme court was correct for the reason sufficiently stated above.' So that what was actually decided in the *Adams* case was that the company was under no obligation to take local passengers, but if it chose to do that kind of business the privilege for doing it could be taxed by the state."

See, also, this same case (*Pullman Co. v. Adams*), 78 Miss. 814, 30 South. 757, 84 Am. St. 647. In the *Allen* case, it was held that, while the state may not impose a tax which is in any way a burden upon interstate commerce, it may impose a privilege tax upon a corporation engaged in interstate commerce, for carrying on that part of its business which is wholly within the taxing state, and which tax does not affect its interstate business or its right to carry it on in that state. Two statutes were involved. The first required each sleeping car company doing business in the state of Tennessee to pay an annual tax of \$500 on each of its cars for the privilege of doing business in that state. The act as interpreted by the court applied to cars running through the state as well as those whose operation was wholly intrastate, and the privilege tax was to be paid upon all cars, regardless of whether they were used in interstate traffic or that which was wholly within the borders of the state. For this reason, taxes exacted under this act were held void as an attempt to impose a burden upon interstate commerce. The second act provided that each sleeping car company doing business within the state "for one or more passengers taken up at one point in this state and delivered at another point in this state and transported wholly within the state, per annum

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\$8,000." This act was sustained as applying to intrastate business, and the *Adams* case was followed to the effect that the Pullman Company could not complain at being taxed for the privilege of doing a local business which it was free to renounce, since it could continue its interstate business, declining local business, and thus escape the attempt to tax it upon business wholly within the state.

Other cases relied upon by the respondent are *Crutcher v. Kentucky*, 141 U. S. 47; *Western Union Tel. Co. v. Kansas ex rel. Attorney General*, 216 U. S. 1; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217; *United States Express Co. v. Minnesota*, 223 U. S. 335; *Oklahoma v. Wells Fargo & Co.*, 223 U. S. 298. The Kentucky case involved an act providing that no agent of a foreign express company should carry on business in that state without first obtaining a license from the state, and that, preliminary thereto, he should satisfy the auditor of the state that the company he represented was possessed of an actual capital of at least \$150,000. Failing these requirements, he was subject to a fine. The court held the provisions of this act relating to license and capital stock imposed conditions on interstate commerce and were clearly a burden and restriction upon such commerce, and hence could not be sustained, adding:

"But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection."

In the light of what we have said as to the provision of the act of 1907 applying only to business done within this state, we take this case as an authority in support of our position rather than against it. In the Kansas case, the court reviewed a statute providing that, before any foreign corporation, even one engaged in interstate commerce, could do a local business, it should pay to the state treasurer for the benefit of the permanent school fund a charter fee of one-tenth of one per cent of its authorized capital upon the first \$100,000, and a smaller percentage upon larger issues of

capital stock. The Western Union Telegraph Company refused to pay the required fee, and the state brought a suit in one of its own courts and obtained a decree ousting the company from doing any local business. A writ of error being granted, it was held that this fee was a tax affecting both the interstate and intrastate business of the company without discrimination, and not a tax for the privilege of doing a local business in the state, and hence void as a burden upon interstate commerce. The vice of this statute, as found by the majority of the court, was that it made the doing of local business conditional upon paying a given per cent on the entire capitalization of the corporation, which manifestly would represent the value of all its business within and without the state. The opinion, however, reiterates the holding in the Kentucky case, that taxes imposed exclusively on an express business carried on wholly within the state would be open to no such objection, and the rule announced in *Osborne v. Florida*, 164 U. S. 650, that a tax directed against local business only under which a corporation might conduct its interstate business without paying the slightest heed to the act, was valid as against the plea that it was a burden upon interstate commerce. Four of the justices joined in a dissent, holding that the tax was valid upon the ground that a state may tax a foreign corporation seeking to do business wholly within the state, and that the right to tax foreign corporations in respect to business done wholly within the state is not taken away by the fact that they also are engaged there in commerce among the states. As we understand the majority opinion, it was not intended to depart from the above rule upon which the dissent was based, the majority holding the opinion that there was no conflict between the views they expressed and the cases upon which the dissent was grounded. So that, so far as the point here involved is concerned, both the majority and minority opinions uphold a tax imposed upon intrastate business alone.

The Texas case involved the validity of a statute imposing

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an annual tax equal to one per cent of its gross receipts on each railroad lying wholly within that state. The railroads there concerned lay wholly within Texas and connected with other lines, and a part, and in some instances much the larger part, of their gross receipts were derived from the carriage of passengers and freight coming from or destined to points without the state. For this reason, the tax was held to be a burden upon interstate commerce, so far as it was based upon or was measured by receipts derived from interstate transportation.

The Minnesota case involved a statute taxing express companies six per cent upon gross receipts for business done within the state. The action was brought by the state to recover certain items which it was claimed the express companies had omitted from their return of gross receipts, and which were properly the subject of taxation under the statute. These omitted items included, (1) receipts from business begun and ending in the state but which passed out of the state in transit; (2) receipts from shipments originating in the state but destined to points outside the state; (3) shipments originating outside the state but destined to points within the state; (4) shipments originating outside the state and destined to a point outside the state but passing through the state of Minnesota in transit. Taxes were not claimed upon shipments of express matter in the classes named where the same express company performed the transportation both within and without the state. As to the shipments in class one, it was held by the state supreme court, upon the authority of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, that nine per cent of the taxes claimed on this class of earnings should be deducted from the amount of recovery allowed in the court of original jurisdiction, since it was disclosed that only ninety-one per cent of the mileage was within the state of Minnesota. This view was sustained by the supreme court of the United States upon the authority of the cited

case. As to the other classes, the supreme court of Minnesota held that it was the intention of the legislature in the statute under consideration to include the earnings from these classes within the state in the gross receipts upon which the tax was based. This construction of the statute was held to be binding upon the supreme court of the United States. The state supreme court further held that the tax was a property tax measured by the gross earnings within the state, which was held to include the earnings of classes two, three, and four, and that the statute was part of a system long in force in Minnesota, based upon the authority of the state constitution, and was intended to afford a means of valuing the property of express companies within the state. Of this construction, the supreme court of the United States says:

“While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.” *United States Express Co. v. Minnesota*, 223 U. S. p. 346.

And the statute was sustained as falling “within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not in itself be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce.” The Oklahoma case involved a statute similar to that held bad in the Texas case, and for the reasons there given was held invalid.

We have entered upon this review of these cases for the reason that respondents insist they support the contention that the statute in question imposes a burden upon interstate commerce, which view seems to have been adopted by the department. As we now view these decisions, in so far as they cast light upon the problem before us, they support, rather than antagonize, our position. Additional supporting cases

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are *Telegraph Co. v. Texas*, 105 U. S. 460; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Alabama State Board of Assessment*, 132 U. S. 472; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Ficklen v. Shelby County Taxing District*, 145 U. S. 1; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692. An examination of the Federal cases shows, as stated in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, that they have been decided upon the principle that taxes of this character should be invalidated only where the necessary effect is to burden interstate commerce or tax property beyond the jurisdiction of the state.

The last contention to be noticed is that, inasmuch as the express companies have a right to come into this state for the purpose of engaging in interstate commerce, and the state is powerless under the commerce clause of the Federal constitution to annex conditions to or impose burdens upon the exercise of that right, it follows that an express company entering this state and engaging in interstate commerce is thereby made a common carrier of intrastate commerce, and is not at liberty to abandon its intrastate business, and that, therefore, the doctrine announced in *Osborne v. Florida*, *Pullman Co. v. Adams*, *Allen v. Pullman's Palace Car Co.*, and *Western Union Tel. Co. v. Kansas ex rel. Attorney General*, that foreign corporations coming into a state for the purpose of transacting an interstate business, whether called common carriers or not, had the right to choose between what points they would do business, and cannot, therefore, complain of being taxed for the privilege of doing a local business which they are free to renounce, does not apply in this state, because of our constitutional and statutory provisions. We accept the premise, but we deny the conclusion. No reason is pointed out why it follows that, because a foreign corporation has a right to engage in interstate business within this state, a right to which the state is powerless to attach conditions, such corporation is thereby made a common carrier of

intrastate business, and is powerless to withdraw from such business. The only section of the constitution referred to is § 13, art. 12, declaring all railroad, canal and other transportation companies to be common carriers and subject to legislative control, and other sections prohibiting discrimination in privileges and transportation charges, and that part of the public service commission law of 1911 making express companies common carriers. To say that these citations support respondents' contention is to read into them something we have not found, and which respondents have failed to point out. We therefore deny respondents' assertion, "that in the constitution and laws of this state a company which enters for the purpose of engaging in interstate commerce is thereby made a common carrier of intrastate commerce." It is equally fallacious if it is meant by this assertion that, as a condition for engaging in interstate commerce, the state requires the corporation to also engage in intrastate commerce. Such a plea violates a rule concerning which there is now no dispute, that the state can impose no burden upon interstate commerce nor exact any condition upon which foreign corporations may engage in such business within this state. If the constitution should be read as imposing an obligation upon corporations doing an interstate business to also engage in a local business, then, as said in the *Adams* case, "the question for us might be which, if not both, the clause of the constitution or the tax act, is invalid."

Respondents make a general reference to the public service commission law of 1911 as supporting their contentions. It may be answered that no provision of that law could operate as a regulation upon interstate commerce. All that it seeks to do, and all that the state has power to do, is to impose regulations upon local business, and while the state cannot say to the foreign corporation, "We will annex certain conditions with which you must comply before you can do an interstate business in or through this state," it can say to such corporation, "If you choose to do a business which is purely local in

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its character and which has attached to it no elements of interstate commerce, you must submit that business to the regulation and control of the laws of this state." To go further than this, the state has not attempted, or if it has, its attempt is vain. So far as any constitutional provision is concerned, we find no essential difference between our constitution and that of the state of Mississippi referred to in the *Adams* case. Our constitution provides, in § 13, art. 12, that "all railroad, canal and other transportation companies are declared to be common carriers and subject to legislative control." Section 195 of the constitution of Mississippi reads: "Express, telegraph, telephone, and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such." If, under this provision of the Mississippi constitution, nothing could be found compelling express companies to do a local business, we can find nothing in the language of our constitution which adds any such power. The whole theory of state control of public service corporations is based upon the doctrine, as expressed in *Munn v. Illinois*, 94 U. S. 113, that, when one devotes his property to a public use, he grants to the public an interest in that use, and must submit to be controlled by the public for the public good to the extent of the interest he has created. "He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to control." So here the express company may withdraw its property from any local use and discontinue such use; but so long as it continues in such use, it must submit to state control and regulation.

Based on these conclusions, we overrule the department opinion, and the judgment in each case is reversed, and the cases remanded with instructions to proceed in accordance with the views here expressed.

PARKER, MOUNT, and FULLERTON, JJ., concur.

ELLIS, J. (concurring)—I signed the original opinion in this case, but a consideration of the decisions of the supreme court of the United States in *Pacific Express Co. v. Seibert*, 142 U. S. 339, cited for the first time on the rehearing, and in *Ohio River & W. R. Co. v. Dittey*, handed down by that court subsequent to the argument of this case, convinces me that the department opinion was wrong. Considering those decisions in connection with the fact, overlooked on the first hearing, that the declaration of our constitution, § 13, article 12, that all railroad, canal and other transportation companies are common carriers and subject to legislative control, is no broader than the cognate clause of the constitution of Mississippi, which has been held by both the supreme court of that state and the supreme court of the United States as not necessarily imposing upon an interstate carrier the duty of doing an intrastate business, I am constrained to concur in the foregoing opinion.

CROW, C. J. and MAIN, J., concur with ELLIS, J.

GOSE, J. (dissenting)—The majority of the court have overruled the view expressed upon the former hearing. *State v. Northern Express Co.*, 76 Wash. 636, 136 Pac. 1160. The statute under review (Laws 1907, p. 79; Rem. & Bal. Code, §§ 9161-9168; P. C. 433 §§ 73-87), is held to be a valid exercise of the legislative power, upon two grounds: (1) That the privilege tax extends only to business begun and ended within the state, and (2) that express companies engaged in interstate business are at liberty to take or renounce intrastate business.

In respect to the first ground, the taxing statute, § 1 (Id., § 9161), provides that any corporation, wherever organized or incorporated, "engaged in the business of conveying to, from or through this state," money, etc., by express service, shall be deemed to be an express company. Section 2 (Id., § 9162), provides that every such company shall, at a time designated in the act, "make and file with the

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state board of tax commissioners" a statement containing, among other things, "the entire receipts . . . for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies." Other sections of the statute provide that the state board of tax commissioners shall, from this statement, ascertain and determine the gross receipts of express companies for business done within the state.

I recognize at the outset that, if the statute may fairly and reasonably be interpreted in two ways, one of which will render it constitutional and the other unconstitutional, the former construction must be adopted. I think the very language of the statute is such as to show the intention of the legislature to fasten the tax upon interstate commerce at the state line. If it was intended, as the majority opinion says, to apply only to business begun and ended within this state, why all the verbiage in the statute, and why the provision "including its proportion of gross receipts for business done by such company within this state in connection with other companies," and why does it refer to corporations engaged in the business of "conveying to, from or through this state?" If the legislature had intended to accomplish only what the majority opinion says, that intention could have been expressed in a few simple words. If the question were before us as to the proper interpretation of the act, in the absence of any Federal restriction, this court would, I think, be unanimous in the view that the legislature intended to make the tax cover all business done within the boundaries of the state, whether interstate or intrastate. The very language of the act shows that it was intended to apply to express companies engaged in an interstate business. Indeed, so far as we are advised, there were and are no other companies. The act was intended to reach business as it then was. I think a fair and reasonable interpretation of the act compels the view that the legislature intended to fasten the

tax upon interstate commerce at the state line, and that it did not intend to limit it to business begun and ended within the state. I am aware that a different view was taken in *Pacific Express Co. v. Seibert*, 142 U. S. 339. It does not appear from that opinion, however, that the state court had theretofore construed the statute. A reading of the opinion will disclose that the court gives no heed to the words of the statute "conveying to, from, or through this state . . . including its proportion of gross receipts for business done by this company within this state in connection with other companies."

But, assuming that the *Seibert* case may be harmonized with the later cases of *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, and *Meyer, Auditor of Oklahoma v. Wells, Fargo & Co.*, 223 U. S. 298, and that it correctly construes the statute as having reference only to business beginning and ending in the state, we are then confronted with the question whether, under the constitution and the statutes of the state, an express company engaged in interstate commerce may carry its wares through the state and be free to take or renounce all state business. The majority opinion refers only to § 13, art. 12, of our constitution. It passes § 15, art. 12, without mention. That section provides that transportation companies shall not discriminate between places and persons or in the facilities afforded, upon the same class of freight or packages, within the state "or coming from or going to any other state." Nor does the majority opinion mention § 7, art. 12, of the constitution, or Rem. & Bal. Code, § 3720 (P. C. 405 § 359), both of which provide that a foreign corporation shall not be permitted to transact business within the state on more favorable conditions than domestic corporations. The public service commission law (Laws 1911, p. 538; 3 Rem. & Bal. Code, § 8626-1 *et seq.*) provides that the term "common carrier" includes "express companies." I refer to this only for the purpose of showing the intention of the law. It is, of course,

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true that a mere legislative declaration could not make a common carrier out of a business that was not in fact a common carrier. It is admitted, however, that express companies are common carriers. Section 9, p. 546 (Id., § 8626-9), of the public service commission act provides that "every common carrier" shall furnish adequate and sufficient service and facilities to enable it to promptly, expeditiously, safely and properly handle all persons or property "*offered to or received by it* for transportation," etc. Section 10, p. 547 (Id., § 8626-10), provides: "Every common carrier shall under reasonable rules and regulations promptly and expeditiously receive, transport and deliver all persons or property *offered to or received by it* for transportation." The italics are ours. Section 53, p. 571 (Id., § 8626-53), empowers the public service commission to require a common carrier to accommodate its business and facilities to the requirements of the law, to the end that it shall without discrimination furnish the public a reasonably adequate and safe service at a reasonable price. As we remarked in the former opinion, it is significant that these duties, restrictions, and regulations are made to specifically apply to every common carrier. They are all placed in the same category. The legislature was addressing itself to a condition, not a theory. It was well known, at the time of the adoption of the constitution and at the time of the adoption of the public service commission law, that practically every express company was a foreign corporation engaged in interstate commerce. The law was addressed to such corporations.

With all due respect to my brothers, I cannot free my mind from the conviction that the majority opinion has misconstrued the tax statute and torn the heart out of both the public service commission statute and the constitution. It is true that it gets the tax; but it is also true that it may be the forerunner of evils infinitely greater than would be the loss of the tax. If the public service commission should fix a rate for express companies for intrastate business below what such

companies would consider adequate, and if in consequence they should elect to renounce all intrastate business, the loss to the fruit, dairying, and other industries of the state in respect to perishable products would be staggering. If I had had a free hand in writing the former opinion, untrammelled by the later Federal decisions, I would have had no difficulty in reaching the conclusion that the act under review only indirectly affected interstate commerce, and hence was not unconstitutional. That view would have accorded with the conclusion reached by Mr. Justice Harlan, the chief justice and two associate justices, who dissented in the *Galveston* case. To avoid the effect of the *Galveston* case, we were compelled to hold that the taxing statute is limited to business begun and ended within the state. I could not reach that view. To avoid the effect of the *Adams* case, we were required to reach the conclusion that interstate carriers could carry their goods through our state, exercise the sovereign powers of the state if they desired in the exercise of the right of eminent domain, and yet be perfectly free to pass up all state business. I could not so construe our constitution or our public service statute. The late case of *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576, in my opinion throws no light on the question. The statute there under review had reference only to intrastate business, and by its very terms excluded all earnings derived from interstate business. The chance remark in *Munn v. Illinois*, 94 U. S. 113, quoted with approval in the majority opinion, has many times been pressed upon this court by railroad companies, but I believe that we have hitherto declined to sanction it. I fear that it will in the future cause us serious embarrassment.

For the reasons stated, I am constrained to dissent from the view expressed in the majority opinion.

CHADWICK, J. (dissenting).—The theory upon which the opinion of the majority of the court is made to rest is that an express company is free to renounce intrastate business

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within the state of Washington. It has treated the question as one of substantive law, and applied the opinions of the Supreme Court of the United States, which were proper enough in the cases there decided, but which have no application here. This case is controlled entirely by the constitution and the statutes of the state of Washington. An express company has been declared by the people of this state to be a common carrier. No reservation is made in the constitution or in the law making those instruments applicable to companies doing a local business. In the interpretation of our constitution and statutes, one of the most valuable guides for a court to follow is to take notice of the conditions existing at the time the applicable principle or statute was adopted—to exercise, as it were, its common sense. Will any one contend for one minute that the people of this state or the legislature had in mind, when they or it referred to express companies, any company other than those with which the public is familiar and which are engaged in interstate commerce and were and are doing an intrastate business within the state of Washington? Surely the legislature had such companies in mind when the public utilities act was passed. There were no other companies to which the law could apply. It is, therefore, made compulsory upon the interstate express companies to do a local business. In the light of the history of the act, it seems to me that it is a great wrong to hold that companies which have been made amenable to the agents of the state by a positive statute may decline to do that which is a benefit to the whole people and that which they should be required to do. If the express companies doing business in this state should accept the law as this court has laid it down, and decline to receive local business from one point to another, it would result in the loss of millions of dollars to the fruit and dairy interests of the state of Washington. And yet this is the condition in which this court has left the people of this state. It has denied to companies doing an in-

terstate business the character of local concerns, unless they voluntarily assume that character; whereas, it was the plain intent of the legislature to make them common carriers, bound to accept the business of the citizens of the state and to be amenable to its laws. I regret that this question did not come to the court upon the application of some shipper at North Yakima, Wenatchee, or other express shipping point, to compel the company to accept an intrastate shipment. Had it been so, I feel that the court would have been able to see the case from a different, and as it seems to me, the true angle. I repeat, that however apt the decisions relied on by the majority may have been in the cases wherein they were pronounced, they have no application here because of the sections of the statute to which Judge Gose has referred, and whose argument is not met by the majority opinion of the court.

[No. 11524. Department Two. July 3, 1914.]

S. E. GIBBENS, *Respondent*, v. WILLIAM NIPP *et al.*,
Appellants, and G. M. STAPISH, *Defendant*.¹

APPEAL—RECORD—AFFIDAVITS. In the absence from the record of affidavits used against an application to dismiss an action for want of diligence in prosecution, the supreme court cannot say there was an abuse of discretion in overruling the motion.

ACTIONS—PROSECUTION—DILIGENCE—PRESUMPTION. The presumption from long delay of want of diligence in the prosecution of an action may be overcome by showing a reasonable excuse.

BILLS AND NOTES—HOLDER IN DUE COURSE—EVIDENCE—SUFFICIENCY. That plaintiff was the holder of notes in due course is established without substantial dispute, where her testimony was that she paid full value, on purchasing the notes as an investment, upon recommendation of a third party and knowledge of the financial standing of the maker, the only evidence of prior notice being a brief indefinite conversation with a stranger of a general nature without reference to the notes, before plaintiff contemplated purchasing them.

¹Reported in 141 Pac. 689.

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Appeal from a judgment of the superior court for Grant county, Steiner, J., entered March 25, 1913, in favor of the plaintiff, notwithstanding the verdict of a jury rendered in favor of the defendants, after a trial on the merits. Affirmed.

Guy T. Walter and Martin & Wilson, for appellants.

Hibschman & Dill, for respondent.

FULLERTON, J.—The respondent brought this action to recover upon two certain promissory notes, dated October 1, 1901, executed and delivered by the appellant William Nipp to G. M. Stapish, in consideration of the purchase price of a threshing machine. The notes were endorsed to the respondent by G. M. Stapish for a valuable consideration shortly after their execution, and action was begun thereon in May, 1904. The appellants, in their answer to the complaint, denied that the respondent was a holder in due course of the notes, and pleaded failure of consideration therefor. The action was finally called for trial in January, 1913, at which time the appellants moved to dismiss the same for want of diligence in its prosecution. The motion was overruled, and the trial proceeded with before a jury, which returned a verdict in favor of the appellants. The respondent, within due time, thereafter moved for judgment notwithstanding the verdict. This motion the trial court granted, entering a judgment for the respondent for the sum demanded in the complaint.

The appellants first assign error on the order of the court refusing to grant their motion to dismiss the action for want of diligence in its prosecution. But we think the record in this court insufficient to enable us to review the question. When the motion was brought on for hearing, the respondent made a showing tending to excuse the delay, and the record contains this showing only partially; certain affidavits considered by the court not being included therein. While undoubtedly a presumption of want of diligence arises from long

lapse of time (*Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112; *First Nat. Bank of Fond du Lac v. Hunt*, 40 Wash. 190, 82 Pac. 285; *Rehmke v. Fogarty*, 57 Wash. 412, 107 Pac. 184), such a presumption is not conclusive, and can be overcome by a showing of a reasonable excuse. As the trial judge found the excuse offered in this instance sufficient, we cannot say he abused his discretion in so finding, in the absence of all of the facts he had before him when passing upon the motion.

On the merits of the cause, the court ruled that there was no substantial evidence to dispute the respondent's contention that she was a holder in due course of the instruments sued upon. With this conclusion, we are constrained to agree. She testified that she purchased the notes as an investment shortly after they were executed, paying their full face value therefor, on the recommendation of a third person having knowledge of the character and financial standing of the maker. In this she is corroborated, both by the original payee of the notes and by the person who recommended them to her, and there is no evidence in the record to the contrary. In seeking to charge her with notice, the appellant William Nipp detailed a conversation he claimed to have had with her concerning the purchase of the threshing machine prior to the date she gives as the time of her purchase of the notes. But aside from the fact that there are many circumstances in the record which tend to show that he was probably mistaken as to the identity of the person with whom he talked, we think all his testimony can be taken as true and still the respondent not be charged with notice. According to his statement, the respondent and himself were comparatively strangers at the time (the respondent, in so far as the record shows, did not even know his name); the conversation was had while he was paying for a meal which he had eaten at the respondent's restaurant, and was brief in time and general in its nature; no specific transaction was described, and nothing was said definitely pointing to these particular notes as being

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Syllabus.

a part of the transaction to which he referred. It will be remembered that the respondent was not then contemplating purchasing the notes in suit, and then had no thought that she would ever have any interest in the transaction. It is not, therefore, possible that the talk impressed her more than the many other complaints she had undoubtedly heard from persons whose business troubles were worrying them, and to which the exigencies of her business situation compelled her to politely listen. She purchased the notes before their maturity on the belief that they were genuine, and it would be too much to say that the appellant's (to her) indefinite talk was sufficient to charge her with taking the notes in bad faith within the meaning of that term as it is used in the negotiable instruments act.

The judgment is affirmed.

CROW, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

[No. 11840. Department Two. July 3, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v. ALBIN JONES,
Respondent.¹

CRIMINAL LAW—DISMISSAL FOR FAILURE TO PROSECUTE—APPEAL—EXCUSE FOR DELAY—DILIGENCE. Accused, convicted in police court and appealing to the superior court, is not entitled to a dismissal for failure of the state to bring the case to trial within sixty days, as required by Rem. & Bal. Code, § 2312, where he made no demand upon the court itself to have the case set for trial, although he frequently requested the prosecuting attorney to move therefor and no criminal cases were set for trial except on such motion; since § 2312, has no application to appeals from convictions in justice court, in view of Id., §§ 1919 and 1920, providing that the bond on appeal shall require the defendant to appear in the superior court and prosecute the appeal, and directing default of his recognizance and sentence against him if he fails to do so; his requests to the prosecuting attorney not being reasonable diligence in the discharge of his obligation to prosecute the appeal.

¹Reported in 141 Pac. 700.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered January 6, 1914, dismissing a prosecution on a statutory defense, for failure of the state to bring the case to trial within sixty days after the filing of a transcript on appeal from justice court. Reversed.

John F. Murphy and *S. H. Steele*, for appellant.

FULLERTON, J.—In September, 1913, the respondent was convicted in the justice's court of Ravensdale precinct, in King county, of the offense of entering a coal mine against caution, and sentenced to pay a fine of fifty dollars. He appealed from the judgment to the superior court of King county, depositing cash in lieu of a bail bond, in the sum fixed by the justice of the peace, to secure his appearance and the due prosecution of the appeal in the superior court. The transcript on appeal was prepared by the justice and filed in the superior court on October 1, 1913. On December 8, 1913, the prosecuting attorney of King county caused the action to be set down for trial on January 18, 1914, duly serving a written notice to that effect upon the respondent. On January 5, 1914, the respondent moved to dismiss the proceeding, basing his motion on the ground that the same had not been brought on for trial within sixty days after the transcript on appeal had been filed in the superior court. The motion was accompanied with the affidavit of respondent's counsel to the effect that he had made repeated requests at the office of the prosecuting attorney for a speedy hearing of the appeal, and that, under the law and practice of the superior court of King county, a defendant in a criminal cause is not permitted to have his case set for trial except upon motion of the prosecuting attorney, and that the delay was wholly without his fault and over his protest. The superior court made no finding that there had been an unreasonable delay in setting the case for trial, but granted the motion on the ground that more than sixty days had elapsed between

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the time the transcript on appeal had been filed in that court and the time the cause was fixed for trial, and entered an order setting aside the judgment of conviction in the justice's court and dismissing the proceedings. The state appeals.

The order of the court was founded upon § 2312 of Rem. & Bal. Code (P. C. 135 § 119), which provides:

"If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown."

In *State v. Parmeter*, 49 Wash. 435, 95 Pac. 1012, we held that this section had no application to an appealed cause from a police or justice's court, that it related only to prosecution instituted in the superior court, and that the appellant himself was obligated to bring the cause on for hearing. In the course of the opinion, the court referred to the sections of statute relating to appeals from justice's court, now found at §§ 1919 and 1920 of Rem. & Bal. Code (P. C. 287 §§ 393, 395) and said that these sections define the method of taking appeals in criminal actions; further saying:

"The former section by express terms provides that the bond to be given by the appellant shall be conditioned that he will appear in the superior court and there *prosecute his appeal*; while the latter directs that, if he shall fail to enter and prosecute his appeal, he shall be defaulted of his recognizance and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted in that court. In view of these sections, it is not necessary for us to determine whether the respondent, after conviction in the police court, could be discharged for unnecessary delay of proceedings and the want of a speedy trial, after he had on appeal demanded trial in the superior court, it not being shown that he ever made any such demand. On the record before us, we are of the opinion that he was not entitled to a discharge, for the reason that he had

been awarded a speedy trial in the police court, that the appeal was taken by him after such trial for his own benefit, and that thereafter he should have diligently prosecuted the same by demanding the new trial to which he was entitled in the superior court. Having failed to do this, he was in no position to invoke the statute in his behalf, and demand his discharge and dismissal of the action.

"He contends, however, that the superior court in making the order of dismissal properly relied on the case of *In re Murphy*, 7 Wash. 257, 34 Pac. 834, as holding that the statute applied when a new trial had been granted after conviction, and that the sixty days should begin to run from the date of the order granting the new trial. We do not regard that holding as applicable to the facts now before us. In that case the superior court had original jurisdiction, and granted the new trial. Here it obtained jurisdiction by appeal. The respondent had been convicted in the police court. No order awarding him a new trial had been made in that or any other court. He was entitled to trial in the superior court only by reason of his appeal if diligently prosecuted. Failure upon his part to so prosecute the same would authorize the superior court to award sentence against him without further trial, in like manner as if he had been there convicted."

In *State v. Miller*, 72 Wash. 154, 129 Pac. 1100, it was held, in a case where there had been a trial and conviction and the reversal thereof on appeal, that the statute had no application to the retrial of the defendant, but that the sixty-day provision was satisfied by his first trial within that period after the information was filed.

The rule of these cases makes it clear that the ground upon which the trial judge rested his decision is not tenable. It remains to inquire whether the showing of cause accompanying the motion justified the reversal of the judgment of conviction in the justice's court, and the dismissal of the cause. We do not think it does. It must be remembered that the appellant himself was obligated to prosecute the appeal. If he failed to do so with reasonable diligence, the appeal was subject to dismissal on the part of the state, leaving him subject

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to punishment under the judgment of conviction, pronounced against him by the justice's court. He cannot, therefore, without some effort made to the court before which the cause is pending to have the cause set for trial, complain that the delay is unreasonable. Here he made no effort in the court to have the cause brought on for hearing. True, he made request at the prosecuting attorney's office to that end, and says that, under the rule of practice in the court of King county, criminal causes are not set for trial except upon motion of the prosecuting attorney. But this was not a cause under the control of that officer. The defendant was himself, in a sense, the prosecutor. He was seeking to relieve himself from an adverse judgment, and before he can claim the right to a dismissal and discharge of the adverse judgment, he must make a reasonable effort before the court itself to have the cause brought on for hearing. Since he did not do this it follows that the judgment of dismissal and discharge was not warranted.

The judgment is reversed, with instructions to reinstate the case and proceed with a trial.

CROW, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

[No. 11859. Department Two. July 3, 1914.]

*In the Matter of the Guardianship of MARTHA E. BAYER,
Incompetent.*¹

INSANE PERSONS—GUARDIANSHIP—ACCOUNTING—EXPENSES—ADDITIONAL ATTORNEYS—NECESSITY. A guardian is not warranted in employing special counsel to defend proceedings for his removal, or to establish the ward's sanity, or to meet objections to his final account, where the issues were not complicated and the general counsel of the guardian was fully able to handle the matters, no necessity for additional counsel being shown.

SAME—EXPENDITURES—APPEAL—FINDINGS. Findings as to necessary traveling expenses of a guardian will not be disturbed on appeal where the lower court was in a better position than the appellate court to try the fact, and the findings do not appear to be contrary to the preponderance of the evidence.

INSANE PERSONS—GUARDIANSHIP—TERMINATION—DISCHARGE OF GUARDIAN—DEBTS. Where an insane ward is found to be competent, she is entitled to the immediate full control of both her person and estate, under Rem. & Bal. Code, § 1671, and it is proper to discharge the guardian, making proper provision for the payment of unpaid debts or matters involving the striking of a balance between the guardian and ward, without making provision for the payment of debts and expenses of the guardian from the property then in his hands.

GUARDIAN AND WARD—ACCOUNTING—EXPENSES AND ALLOWANCES—APPEAL—REVIEW. On appeal by a ward, from allowances to the guardian on final settlement, for personal expenses and expenditures involving the welfare of the ward, the supreme court will defer to the judgment of the lower court, where it was familiar with the local situation, had a great deal to do with the proceedings, and could know what was proper in determining the justness of the claims.

Cross-appeals from a judgment of the superior court for King county, Frater, J., entered July 28, 1913, settling a guardian's account, after a hearing before the court on the merits. Affirmed.

James R. Chambers, for appellant.

James B. Murphy, for respondent.

¹Reported in 141 Pac. 682.

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Opinion Per MORRIS, J.

MORRIS, J.—This appeal attacks the correctness of the lower court's judgment in settling the accounts of the guardian in caring for the person and estate of the ward, covering a period of over four years, and involving four reports and one supplemental report.

Martha E. Bayer was declared to be an incompetent on December 31, 1908, and J. N. Dotson, a brother, was appointed guardian of her person and estate. For about a year, Mrs. Bayer was kept in her home in the Green Lake district of Seattle. She was then confined in a private sanitarium for about a year and a half, when she was taken to the home of the guardian in Cashmere, where she remained fourteen months. She was then confined for a short time in one of the state hospitals for the insane, from which she was discharged November 30, 1912. The first report filed by the guardian carried his account up to March 31, 1910, and shows the receipt of \$4,780.76, and the expenditure of various sums on behalf of the person and estate of the ward, amounting to \$3,209.28. Upon the filing of this report, the court appointed John Arthur, a member of the Seattle bar, to investigate the account on behalf of the ward and to report his conclusions. This report was favorable, and on April 16, 1910, this report was, in all things, approved and allowed.

In February, 1912, the guardian filed a second report, showing further receipts amounting to \$2,690.51, and further expenditures amounting to \$1,132.75. In December, 1912, a third report was filed, and on January 8, 1913, the guardian filed his final report, followed by a supplemental report in July, 1913. Mrs. Bayer filed objections to these reports in February, 1913, asking that the order approving the first report be annulled and that the same be reconsidered. In her petition, she attacks various items in this report under what is known in the record as division 1. In division 2, she attacks the report of February, 1912. In division 3, the report of December, 1912. In division 4, she makes complaint of certain acts of the guardian in relation to a piece of real

estate in Lincoln county, by reason of which she claims to have been damaged in the sum of \$2,250. In division 5, she attacks the acts of the guardian in defending certain proceedings brought by her to establish her competency, and claims that, by so doing, her estate was damaged to the extent of \$2,000. In due time, these matters came on to be heard, and the lower court entered judgment approving and allowing the first report in all things, to which Mrs. Bayer takes exception. The second report was approved and allowed, save an item of \$250 paid out by the guardian as attorney's fees, to which both parties take exception; the guardian, to the disallowance of the attorney's fee; and Mrs. Bayer, to the approval and allowance of the remaining items of the report. The third report was allowed, save another attorney's fee of \$125 and the disallowance of \$300 upon the personal expense account of the guardian; he excepting to the disallowance of these two items, and Mrs. Bayer excepting to the allowance of the remaining items. The lower court denied the exceptions referred to in divisions 4 and 5 of Mrs. Bayer's objections, to which she takes exception. Certain allowances and disallowances are made in the supplemental report, to which both parties take exceptions. In the supplemental report, an item of \$300 attorney's fee to Hugh M. Caldwell as attorney for the guardian is disallowed, to which the guardian excepts. The guardian is denied compensation for his services upon the ground that his charges and expenditures as guardian are excessive, to which the guardian excepts. The court then finds that the estate of the ward is indebted to the guardian for moneys spent and obligations incurred in the administration of the estate, including allowances made and approved by the court, in the sum of \$3,148.13, upon which a credit of \$1,816.92 is given, representing the value of a wheat crop sold by the guardian and which the guardian is directed to apply in payment of the ward, and a judgment is then given against Mrs. Bayer for \$1,313.21. To this portion of the judgment, both parties ex-

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cept. The guardianship is then terminated and the guardian directed to turn over certain property to Mrs. Bayer, to which he excepts.

To go fully into these various exceptions would be to write a small book. Counsel for the various parties have filed briefs and abstracts covering over 800 pages; and while the fact that the case is burdensome does not lessen the duty of the court to carefully examine each assignment of error and give to it such consideration as its merits demand, the court cannot be expected to discuss these assignments separately, nor to voice all the considerations which enter into the conclusions we have reached. Each party moves to dismiss the other's appeal. We content ourselves with denying both motions without further reference to the grounds upon which the respective motions are based, and proceed to the merits of the appeals.

First, we will take up the case as presented by the guardian. Certain brothers and sisters of the ward and the guardian commenced a proceeding in the superior court of King county to remove the guardian, complaining that the ward was not being properly cared for nor her estate properly administered. In defense of these proceedings, the guardian retained Morris & Shipley, of the Seattle bar, and paid them \$250 for their services. The lower court refused to allow this payment against the estate of the ward, upon the ground that Mr. Murphy, general counsel for the guardian, was fully able to handle the matter, and that no necessity was shown for the employment of additional counsel. We agree with the lower court in both its ruling and the reasoning upon which it is based. So far as the issues of fact or law are concerned, they presented nothing complicated demanding any assistance from outside counsel.

Objection is also made to the refusal of the court to allow J. P. Wall, of the Seattle bar, an attorney fee of \$125, for services rendered the guardian in contesting the proceedings in which the ward sought to have her competency and sanity

established. What has been said as to the previous objection applies to this, and the ruling is sustained. So as to the claim of Hugh M. Caldwell, of the Seattle bar, for personal services on the hearing of the final account. If the guardian desired the services of other attorneys than the regular counsel in meeting the objections to his account made by the ward, he cannot subject the estate to the payment of such attorney fees without a further showing of necessity than appears here.

Objection is made to a reduction of the personal and traveling expenses of the guardian from \$670.97 to \$300. The items embraced in this claim cover trips from Cashmere to Seattle and from Cashmere to Sprague, which the guardian claims he necessarily made for the benefit of the ward or her estate. Included, also, in this item is the expense of taking the ward to and from Cashmere. The guardian should be allowed all necessary expenses in caring for the ward's person and estate, but the lower court, who had charge of this estate and was familiar with the necessities of the situation by reason of his personal contact with and knowledge of the guardian and ward, knew what expenditures the reasonable and proper care of the person and estate of the ward demanded, and is in a much better situation to try a fact of this character than we are from the record alone. His judgment should therefore be followed, unless it appears that such judgment is contrary to the preponderance of the evidence and not made with due consideration of all the pertinent facts. We find nothing to so indicate, and believing the lower court's judgment in a matter of this kind is better than ours, we accept it.

A like objection is made to the reduction of another traveling expense claim from \$191 to \$97.05. We make the same disposition of this objection as of the previous one, and for the same reason.

The next objection is to the order of the lower court terminating the guardianship and discharging the guardian, in-

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cluding the orders incidental thereto as to the disposition of the ward's property then in the hands of the guardian, without making provision for the payment of debts and expenses of the guardian. The court having found that the ward was sane and competent, she was entitled to the immediate full control of both her person and estate, under Rem. & Bal. Code, § 1671 (P. C. 409 § 781). The lower court, though determining a matter usually heard on the probate side of the court, was still sitting as a superior court of general jurisdiction, with ample power to make and enforce any decree or judgment proper in the premises. For this reason, following the plain mandate of the statute, it is better to terminate the guardianship proceeding when the ward is found fully competent to care for and manage her person and estate, making proper provision for the payment of any unpaid debts or matters involving the striking of a balance between the guardian and ward.

The next three assignments may be treated together, as they all go to the failure of the court to grant allowances to the guardian. These objections are disposed of by what has already been said, and we refrain from further comment.

We next take up the exceptions of the ward to the judgment entered, and these are mainly to the failure of the court to allow objections offered by the ward to the various expenditures made by the guardian as shown in his various reports, and involves the allowances for nurses for the ward while she was at the Green Lake home, the bills for the maintenance of the home, the charges while the ward was confined in a private sanitarium, the personal expenses of the guardian, and allowances made to the guardian in the action brought by the brothers and sisters and in the insanity proceedings. In these matters, as in the disallowance to the guardian, we must defer largely to the opinion of the lower court, who was familiar with the local situation, had a great deal to do with these proceedings, and could know what was proper in determining the justness of these various claims.

The two proceedings referred to involved, to some extent, the welfare of the ward, and to that extent it was proper to charge the estate with at least a share of the cost and expenses; and inasmuch as the lower court heard these proceedings, we prefer his judgment to our own in determining to what extent he should allow the guardian's claims.

As to the objections presented by divisions 4 and 5, we shall say but little, and not attempt to pass upon the point suggested as to whether or not the accounting as to the Lincoln county lands and wheat crops, or the character of the land as to whether it was community or separate property, should be raised in this proceeding or some other. So far as the character of the land is concerned, this question is made the issue in a pending action which we will doubtless have to pass upon soon, and we prefer determining that question, if we must, upon a record presenting that question alone, devoid of any jurisdictional questions.

As to the acts of the guardian, we are satisfied, as was the lower court, that, in treating the Lincoln county property as he did and in all his relations to it, he was acting in good faith and according to the best information he had.

Objection 5, as previously said, goes to the action of the guardian in contesting the proceeding brought by the ward to establish her competency. The extent to which a guardian is justified in contesting such proceedings must largely depend upon the peculiar circumstances of each case, and from this record we concur in the conclusion reached by the lower court.

These observations dispose of the various contentions of the parties. In view of the conclusions we have reached, neither party will recover costs in this court, and the judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

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Opinion Per MOUNT, J.

[No. 11980. Department Two. July 3, 1914.]

WILLIAM H. PIERRE, *as Administrator etc., Respondent*, v.
KANSAS CITY CASUALTY COMPANY, *Appellant*.¹

INSURANCE—ACCIDENT INSURANCE—ACTIONS—CAUSE OF FIRE—EVIDENCE—QUESTION FOR JURY. In an action upon an accident policy insuring against accidental injuries "by the burning of a building while the beneficiary is therein," there is sufficient evidence to make a question for the jury as to whether the beneficiary's dress caught fire from the "burning of a building," where the fire was discovered when she was sitting near a stove in the dining room, and she supposed that a blanket caught fire from the stove, but it appears that she had just previously been to the kitchen, where a burning stick was found on the floor, the linoleum and carpet in front of the kitchen range were on fire, fire had extended to and burned the floor of the next room, and it is reasonably certain that her dress caught fire from the fire in the kitchen.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered November 22, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon an accident insurance policy. Affirmed.

William E. Campbell, for appellant.

A. Emerson Cross and *Dan Pearsall*, for respondent.

MOUNT, J.—This action was brought by William H. Pierre, as administrator of the estate of Christine A. Pierre, deceased, to recover the sum of \$5,000, upon an accident policy of insurance, issued by the defendant to William H. Pierre. Christine A. Pierre, his wife, was named in the policy as the beneficiary; and section 10 of the policy insured her against the effect of external, violent, and accidental injuries caused, among other things, "by the burning of a building while the beneficiary is therein." The policy provided that, in event of the loss of the life of the beneficiary under this section, the amount payable should be paid to the estate of the

¹Reported in 141 Pac. 690.

beneficiary. It is alleged in the complaint that Mrs. Pierre lost her life by means of burns caused by the burning of a building while she was therein. The answer denies this fact. Upon the trial before a jury, a verdict was returned in favor of the plaintiff. The defendant has appealed.

It is argued by the appellant that there was no sufficient evidence to go to the jury; and for that reason the court erred in not sustaining the appellant's motion for a directed verdict. This is the only question presented upon the appeal.

The facts, as shown by the respondent's evidence, are about as follows: No evidence was introduced on behalf of the appellant. The Pierre residence was a one-story cottage, consisting of living room, dining room, kitchen, two bedrooms, pantry, and bath. One of these bedrooms was entered from the dining room and the other from the kitchen. Assuming the house faced toward the east, the bedroom entered from the dining room was directly north. An airtight heating stove was situated in the northeast corner of the dining room. The kitchen was immediately to the west of the dining room. A large kitchen range occupied the northeast corner of the kitchen. The bathroom was directly west from the kitchen range. The kitchen bedroom was directly north of the kitchen. There was a passageway about four feet in width between the bathroom and the kitchen range, which passageway led past the front of the kitchen range to the kitchen bedroom. The kitchen floor was covered with linoleum; and there was a piece of carpet extending from the kitchen bedroom on the linoleum in front of the kitchen range. Between the range and the bathroom, and standing partly in the bathroom door, was a clothes rack, upon which some baby's clothing was hanging. Mr. and Mrs. Pierre were living in this home, in the city of Aberdeen, on the 28th day of March, 1912; and the policy above mentioned was in force.

About 10 o'clock in the morning on that date, Mrs. Pierre was attempting to give her three-weeks old baby a bath. Up to that time, Mrs. Pierre had not bathed her baby; a trained

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nurse who had gone the evening before had previously done this; and Mrs. Pierre was endeavoring to bathe the baby with the assistance of her servant girl. They had arranged a small bathtub in the dining room near the heating stove, and also a chair upon which was baby's clothing, and a rocker in front of this stove. After these preparations, Mrs. Pierre went into the kitchen to the rack containing clothing in front of the kitchen range, there obtained some of the baby's clothing, and returned to the dining room and closed the door. At this time, there were fires in both the dining room stove and in the kitchen range. After Mrs. Pierre had closed the dining room door and the servant girl had gone on to the back porch or into the basement, she heard Mrs. Pierre cry, "I am on fire." Whereupon she ran into the dining room and found Mrs. Pierre with the baby undressed except its undershirt. Mrs. Pierre's dress was on fire along her right leg. After an unsuccessful attempt to smother the flames, and to remove Mrs. Pierre's dress, the servant girl took the baby and started out of the back door through the kitchen. Mrs. Pierre followed the servant girl into the kitchen, and was by her directed to get a comfort or quilt and wrap up in it and to keep out of the wind. Mrs. Pierre, after obtaining the quilt, followed the servant girl out on to the porch and rolled on the floor in an attempt to put out the flames. Neighbors soon gathered about her, the fire upon her clothing was extinguished, and she was carried into the house. She had been severely burned, so that she soon after died from the effects of the fire. While she was being carried into the house, it was discovered that the linoleum and carpet in front of the kitchen range were on fire. The fire had extended into the bedroom to the north of the kitchen, and was burning upon the floor in that room. This fire was immediately extinguished, and it was discovered that the floor had burned so that the nails in the tongues and grooves of the floor were exposed. The house was full of smoke.

A physician was immediately called. When the physician arrived, Mrs. Pierre was still conscious and remained so for a few hours. The physician asked her how she caught fire. She told him that it was caused by the stove; that she was bathing the baby as she was sitting by the stove and that the blanket caught fire from the front of the stove. The physician noticed that the stove had a fire in it but that the stove door and the draft were closed. At the time the fire was extinguished in the kitchen bedroom and in front of the kitchen range, a piece of stovewood partially burned and burning was found upon the floor.

It is argued by the appellant, from these facts, that there was no sufficient evidence to go to the jury of the fact that the fire which burned Mrs. Pierre was caused by the burning of the building. We are satisfied, from a reading of the abstract of the evidence, that the evidence tending to prove that the fire which burned Mrs. Pierre and caused her death originated from the burning of the building was sufficient to be submitted to the jury. No one saw how the fire occurred. It is apparent from the record that Mrs. Pierre herself did not know how it started. She was evidently sitting by the dining room stove at the time she discovered that her clothing was on fire. She naturally supposed that she caught fire from the stove. She apparently did not know that there was a fire on the floor of the kitchen. She had been to the place where evidently the fire was burning on the kitchen floor a few minutes before she discovered herself to be on fire. We find no evidence in the record that the fire in front of the kitchen range and in the bedroom could have originated from the fire which was burning the clothing of Mrs. Pierre, because it is not shown that she was at that place except when she went to obtain the baby's clothing from the clothes rack. So it is reasonably certain that the fire was burning upon the floor in the kitchen at the time she was there prior to the time she discovered herself to be on fire, and that her dress became ignited at that time. Not knowing of that fire, it was

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natural for her to suppose that she in some manner had caught fire from the stove by which she was sitting at the time she discovered that her clothing was burning.

It is apparently conceded by the appellant that, if the clothing of Mrs. Pierre caught fire from the fire which was burning the building, then the appellant is liable under the policy. But it is argued that, in submitting the case to the jury, the court permitted the jury to guess and speculate as to the origin of the fire which caused Mrs. Pierre's death. It is no doubt the rule that the jury will not be permitted to speculate between causes for which the appellant would and would not be liable. But where the circumstances are such as to make it reasonably certain that the cause of the injury was one for which the appellant was liable, the evidence is sufficient to go to the jury. The circumstances disclosed by the record point almost conclusively to the fact that the injury to Mrs. Pierre was caused by fire which was burning the building in the kitchen, and was not caused by the dining room stove. The court very clearly instructed the jury that, if the fire which caused Mrs. Pierre's death was caused by the dining room stove, that then there could be no recovery; but if they found by a preponderance of the evidence that the fire which caused her death was the fire in front of the kitchen range and which was burning the building, then the appellant would be liable. We are satisfied that there was sufficient evidence to go to the jury upon this question, and the judgment is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 12018. *En Banc*. July 6, 1914.]

P. H. JOHNS, *Respondent*, v. J. L. WADSWORTH, *as County Auditor, et al., Appellants*.¹

COUNTIES—FUNDS—GIFTS—AID TO AGRICULTURAL ASSOCIATIONS—CONSTITUTIONAL LAW. Rem. & Bal. Code, § 3024 *et seq.*, providing that the county commissioners may make an appropriation to a county agricultural fair association to pay expenses and premiums awarded, violates Const., art. 8, § 7, prohibiting a county from giving any money or property or loaning its money or credit to or in aid of any individual, association or corporation except for the necessary support of the poor and infirm, etc.; and it is immaterial that § 3025 makes the county commissioners *ex officio* members of the fair association, and that § 3026 provides that all buildings and structures erected and the funds appropriated shall become the property of the county.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 11, 1913, enjoining the issuance of a county warrant, at the suit of a taxpayer, upon sustaining a demurrer to the answer. Affirmed.

Lorenzo Dow, W. W. Keyes, and Gordon & Easterday, for appellants.

T. L. Stiles, for respondent.

Post, Avery & Higgins, amici curiae.

GOSE, J.—This is an action by a resident and taxpayer of Pierce county to enjoin the issuance and payment of a county warrant. The facts are these: On the 18th day of July, 1913, the board of county commissioners of Pierce county, for the purpose of donating and giving to the Western Washington Fair Association the sum of \$3,586.19, allowed a claim to the association for that amount, conformably to the provisions of the code (Rem. & Bal. Code, § 3024 *et seq.*; P. C. 111 § 1). The association is a private corporation, organized for the purpose of holding a county fair and giv-

¹Reported in 141 Pac. 892.

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ing an exhibition of stock, agricultural and dairy products, including articles manufactured in Pierce county. It conducts the only agricultural fair in the county. A demurrer was sustained to an answer setting forth these facts. The defendants having announced that they did not desire to plead further, judgment was entered in favor of the plaintiff. This appeal followed.

The code, Rem. & Bal. Code, § 3024 (P. C. 111 § 1), provides:

“Any agricultural fair association which has a corporate existence for the purpose and object of holding a fair and agricultural exhibition of stock, cereals and agricultural produce of all kinds, including dairy produce as well as arts and manufactures in any county, may apply to the board of county commissioners of such county for a grant to pay expenses and premiums awarded.”

Section 3025 (P. C. 111 § 3) provides that the members of the board of county commissioners shall be *ex officio* members of the county agricultural fair association, in all counties where appropriations are made under the provisions of the act. Section 3026 (P. C. 111 § 5) provides, that no more than one county agricultural fair shall be held in any county in any one year; that any association applying for the benefit of the appropriation must have a corporate existence, and that all buildings and structures erected with the funds appropriated shall become the property of the county making the appropriation. Of the applicable provisions of our constitution, art. 1, § 29, reads: “The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.” Const., art. 8, § 6, prohibits counties from incurring indebtedness for any other than “strictly” county purposes. Const., art. 8, § 7, provides:

“No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, except for the necessary support

of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company, or corporation."

The appellants, contending for a liberal construction of the constitution so as to effectuate the intention of those who framed it and the people who adopted it, say: "It must be conceded that the main and chief purpose of an appropriation made conformably to the statutes in question is to promote a public purpose." Counsel who have filed a brief as *amici curiae* argue that the purpose of the constitution is to prohibit the county from aiding in any manner a purely private enterprise, and that a constitutional provision should be interpreted so as to further the known purposes for which it was adopted.

The section of the constitution last quoted, in most express terms, prohibits a county from giving any money, property or credit to, or in aid of, any corporation, except for the necessary support of the poor and infirm. If the framers of the constitution had intended only to prohibit counties from giving money or loaning credit for other than corporate or public purposes, they would doubtless have said so in direct words. That agricultural fairs serve a good purpose is not questioned, but the constitution makes no distinction between purposes, but directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of, any corporation, subject to the exception noted. In *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407, after referring to § 7, art. 8, of the constitution, this court said that a recurrence to the history of the times will show that many municipalities had become bankrupt because of liabilities incurred in aid of railroads, "and various other public improvements which were deemed advantageous" at the time. In *Rands v. Clarke County*, 79 Wash. 152, 139 Pac. 1090, we said that the word "corporation," in the article under review, did not include the Federal or state governments, or any of their members. In

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Wilkesbarre City Hospital v. County of Luzerne, 84 Pa. St. 55, it was held that an appropriation from county funds to a corporation organized to conduct a charitable hospital was in conflict with the constitution of the state, which was similar to ours. The act there reviewed limited the appropriation to the support of such poor patients under treatment in the hospital as were unable to pay for their treatment. In that case, the court said:

"A law enabling a private incorporated hospital to make requisitions upon a county, for the payment of its charges for the support of patients under treatment, even though they be paupers, is an appropriation of money by the county to the corporation and comes within the prohibition of the constitution."

Here the appropriation is to a private corporation organized for a worthy purpose, educational in its nature. There is no room, however, for construction. Unless plain, simple, direct words have lost their meaning, the legislature was without power to authorize the gift. The act authorizes a "grant" to pay "expenses and premiums." The amendment of 1909, which provides that the members of the board of county commissioners shall be *ex officio* members of the association, adds nothing to the validity of the act. The same may be said of the amendment which provides that the buildings erected with the money appropriated shall become the property of the county making the appropriation. How money given to pay "expenses and premiums" shall be transmuted into buildings we are not advised. Counsel for the respondent very pertinently observes:

"Whitworth college is almost on the point of being removed from Tacoma to Spokane, because it needs money. The college is a great public benefit to Tacoma, probably as much as the fair is to the county. What is to hinder the legislature from authorizing the city to supply the lacking funds, giving them subject to the condition that the mayor shall be *ex officio* a member of the college board of trustees, and that

the college treasurer shall report annually how the money was spent? Many people think that one of the greatest institutions a city can have is a theater and auditorium; why not contribute ten or fifty thousand dollars to the construction of one, put a councilman or two on the board, and have a yearly account filed?"

Such illustrations might be multiplied, and who shall say that such associations are not worthy, or that they would not conduce to the public good?

The appellants, among other cases, have cited *Taylor v. Thompson*, 42 Ill. 9; *Speer v. School Directors etc. of Blairsville*, 50 Pa. St. 150; *Broadhead v. Milwaukee*, 19 Wis. 658, and *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 27 Am. St. 95, 14 L. R. A. 474. In the *Taylor* case, it was held that a tax imposed for the purpose of procuring funds to secure volunteers to the United States army when civil war was raging was a tax for "corporate purposes." The *Speer* and *Broadhead* cases are to the same effect. In *Daggett v. Colgan*, it was held that an act which appropriated money to be used in the construction of buildings and maintaining an exhibit of the products of the state at the World's Fair, to be held at Chicago, was not in conflict with the constitution of the state. In principle it does not differ from the rule announced in *Rands v. Clarke County*.

Counsel who appear as *amici curiae* have cited numerous authorities and made an extended argument which takes a wide range. We have examined the cases cited and can say confidently that none of them are in point. Many of them are based upon constitutional provisions essentially different from ours. Others merely decide which of two agricultural societies is entitled to a small appropriation made by the county or the state, there being no constitutional question raised. *Poweshiek County Cent. Agricultural Soc. v. Shaffer*, 86 Iowa 377, 53 N. W. 304, illustrates the last class of cases. In that case, two county agricultural societies claimed the right to receive aid from the state. The court held that both

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were entitled to receive the aid. In *State v. Robinson*, 35 Neb. 401, 58 N. W. 213, 17 L. R. A. 383, it was held that, as a general rule, the legislature is invested with authority to determine what purposes are matters of public concern so as to render taxation permissible. In the absence of constitutional restriction, this is undoubtedly true. It would also be true if the only limitation in the constitution was that the appropriation should conduce to the public welfare.

The judgment is affirmed.

Crow, C. J., MOUNT, MORRIS, MAIN, and CHADWICK, JJ., concur.

ELLIS, J. (concurring)—It is with extreme reluctance that I have given my assent to the foregoing opinion. The grant in question is of obvious public benefit. The terms of the quoted provision of the constitution are, however, so clear and explicit as to leave no room for construction. We can do no more than acquiesce in what the constitution has already plainly declared. To do otherwise would be an act of judicial lawlessness. I am, therefore, constrained to concur.

[No. 11715. Department Two. July 7, 1914.]

CREDITORS COLLECTION ASSOCIATION, *Appellant*, v. FRANK E.
BISBEE *et al.*, *Respondents*, NORTHERN PACIFIC
RAILWAY COMPANY, *Garnishee, Defendant*.¹

EXEMPTIONS—PROPERTY EXEMPT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 563, subd. 4, providing for an exemption to a householder of specified domestic animals, with a proviso that, if the householder does not possess or desire to retain the animals named, he may select and retain "other property" not to exceed two hundred and fifty dollars in value, the "other property" to be selected must be property of a like nature, under the rule of *ejusdem generis*; hence money cannot be selected in lieu of such exempt property.

STATUTES—TITLE AND SUBJECTS—AMENDMENTS. The law of 1907, Rem. & Bal. Code, § 703, amending the act relating to wage exemptions from garnishment, is not unconstitutional in that it fails to refer in its title to, or to set forth at length, Id., § 563, subd. 4, being part of the general exemption law, exempting specified property from sale on execution and attachment; since the acts in nowise conflict or relate to the same subject-matter.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 25, 1913, upon findings in favor of the defendants, upon an agreed statement of facts. Reversed.

Beechler & Batchelor and *James C. McKnight*, for appellant.

R. B. Brown, for respondents.

MORRIS, J.—This appeal involves the construction of our exemption laws, as applied to an agreed statement of facts, from which it appears that the appellant recovered judgment by default before a justice of the peace for \$61.50, against the respondents, upon a debt for actual necessities. A writ of garnishment was issued, directed to the railway company, to which the railway company answered, admitting an in-

¹Reported in 141 Pac. 886.

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debtedness to Frank E. Bisbee in the sum of \$151.52 for wages earned during the months of December, 1912, and January, 1913. On the return day of the writ of garnishment, respondents presented a claim for exemption, alleging that, outside of household furniture worth not to exceed \$300, they possessed no property except money due from the railway company, and that they elected to select and retain such money in lieu of the specific property mentioned in subd. 4, Rem. & Bal. Code, § 563 (P. C. 81 § 872). The justice of the peace allowed respondents an exemption to the extent of \$40, under Rem. & Bal. Code, § 703 (P. C. 81 § 523), exempting not to exceed ten dollars per week for four successive weeks where the debt was contracted for actual necessities; from which ruling the respondents appealed to the superior court, where they obtained a ruling that the claim of exemption should be allowed in full, under subd. 4, § 563; and that § 703, Rem. & Bal. Code, was unconstitutional. Section 703 is chapter 210 of the Laws of 1907, p. 477, and is as follows:

"An Act relating to exemptions and amending section 5412 of Ballinger's Annotated Codes and Statutes of Washington.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. That section 5412 of Ballinger's Annotated Codes and Statutes of Washington be amended to read as follows: Sec. 5412. Current wages or salary to the amount of one hundred dollars (\$100.00) for personal services rendered by any person having a family dependent upon him for support, shall be exempt from garnishment, and where it appears upon the trial, or by answer of the garnishee, when not controverted as hereinafter provided, that the garnishee is indebted to the defendant for such current wages or salary for an amount not exceeding one hundred dollars (\$100.00), the garnishee shall be discharged as to such indebtedness: Provided, That if the garnishment be founded upon a debt for actual necessities furnished to the defendant or his family or his dependents, no exemption shall be allowed in excess of ten dollars (\$10.00) out of each week's wages or

salary, whether said wages or salary are paid, or to be paid, weekly, bi-weekly, monthly or at other intervals, and whether there be due the defendant wages for one week or a longer period: Provided, however, That said exemption shall in no event be allowed out of wages or salary for a longer period than four (4) consecutive weeks: And provided further, That no money due or earned as wages or salary shall be exempt from garnishment in lieu of any other property. The provisions of this section shall apply to actions in the superior court or before justice of the peace, and shall govern exemptions of wages or salary to the exclusion of all other statutes or parts of statutes."

Section 563 provides:

"The following property shall be exempt from execution and attachment, except as hereinafter specially provided:

. . . 4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, That in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section."

We are unable to agree with the lower court in either of these holdings. The words "other property," appearing in the proviso of subdivision 4, can refer only to other property of a like nature to that specifically mentioned, under a well-known rule of statutory construction. To hold that money falls within the phrase "other property," is to do violence to the rule of *ejusdem generis*. *Carter v. Davis*, 6 Wash. 327, 33 Pac. 833; *In re Gerber*, 186 Fed. 693; *In re Scheier*, 188 Fed. 744; *Ballard v. Waller*, 52 N. C. 84. In the *Carter* case, the action was brought by the wife of the

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debtor against the sheriff, to recover property levied upon by the sheriff under writs of attachment issued against the husband, and also to recover certain money as the proceeds of attached property that had been sold. This property consisted of two horses for which the sheriff had received \$165, and certain other livestock for which he received \$250. The wife had claimed exemption of certain household goods not involved in the action, and also \$250 in coin the proceeds of the sale of the livestock selected in lieu of the exemptions provided for in subd. 4. It was sought to base the exemption right as a lieu exemption upon subd. 3 of § 563, exempting to each householder certain enumerated animals "and other household goods, utensils and furniture not exceeding \$500 in coin in value." This contention was denied, the court holding that no right was conferred upon the debtor to retain other property of a different character in lieu of that authorized to be retained as exempt. In the *Gerber* case, a Seattle bankrupt sought to retain \$250 in money in lieu of the property specified in subd. 4. The circuit court of appeals, in denying the right of exemption, cites the *Carter* case as authority, and says:

"If, as the court there held, the right given by the Washington statute to select 'other household goods, utensils and furniture,' in cases provided for, was confined to other property of the same kind, and conferred no right to retain or select other property of a different character in lieu of that authorized to be selected and retained, it would seem to follow necessarily that the same construction must be given to like provisions contained in subdivision 4, § 563, Rem. & Bal. Code."

In the *Scheier* case, Judge Rudkin, in construing this same provision holds that, if the bankrupt is not possessed of the animals specifically mentioned, he is not entitled to retain from his assets other property of the value of \$250 in lieu thereof. The North Carolina case, construing a like provision, says:

"The enumeration of particular articles, one cow and calf, &c., concluding with the words, 'and such other property,' by an established rule of construction restricts it to other property of the *like kind*." *Ballard v. Waller*, 52 N. C. 84.

The case of *McLarty v. Tibbs*, 69 Miss. 357, 12 South. 557, in applying this rule to an exemption statute, says: "This is so palpably plain as to require no argument." We therefore hold that the lower court was in error in its first ruling.

Neither can we sustain the ruling that the act of 1907 is unconstitutional. The main argument in support of this ruling proceeds upon the theory that, under subd. 4, "other property" includes property of any description which the debtor who does not possess the specified animals may select and retain in lieu thereof, and that the law of 1907 by amendment changes the scope and character of subd. 4, § 563, without the necessary reference in the title of the act or setting forth the amended section at length; thus violating three mandatory constitutional provisions, §§ 19, 37, and 38, of art. 2, of the constitution.

The argument falls because built upon a false premise. Subdivision 4 provides, not for a general but a specific exemption, and the act of 1907 neither purports to amend this section, nor does it enact any conflicting provision. All that the act of 1907 seeks to do is to amend Bal. Code, § 5412, which originally had been § 23 of the garnishment act of 1893, bearing no relation whatever to subd. 4 nor treating of the same subject-matter, the one being a specific act relating to wage exemptions from garnishment, and the other being part of the general exemption law as amended in 1885, relating to specifically enumerated species of property as exempt from execution and attachment. Section 23 of the act of 1893 was amended by the garnishment act of 1897 by fixing the amount exempt under the act at the sum of \$100. This section was again amended in 1901 by providing that, if the garnishment was founded upon a debt for

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actual necessities, the exemption should not exceed ten dollars per week for four successive weeks. Then comes the act of 1907, enlarging somewhat upon the ten dollars per week exemption and adding, "that no money due or earned as wages or salary shall be exempt from garnishment in lieu of any other property." Thus it is clear that the legislature has, through these various amendments, carefully recognized and preserved § 5412 as relating purely to exemption of wages from garnishment, and while becoming a part of the general exemption laws of the state, in nowise conflicts with nor tends in any way to change the provisions of § 563 relating to exemptions of specifically enumerated personal property from execution and attachment. So that, if it be said that these statutes are *in pari materia* and must therefore be construed together and the intent of the legislature determined from a consideration of the whole, it is clear that the legislative intent has been clearly expressed to preserve the integrity of these special laws and to maintain and preserve a clear distinction between them.

The judgment is therefore reversed.

CROW, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 11981. Department Two. July 7, 1914.]

LEE BERRYMAN *et al.*, *Appellants*, v. EAST HOQUIAM BOOM
AND LOGGING COMPANY, *Respondent*.¹

NEGLIGENCE—DANGEROUS AGENCIES—SPLASH DAM—WARNING—EVIDENCE—SUFFICIENCY. Where the release of a splash dam sent the water down the stream at the rate of eight or nine miles per hour, and created a rise at a dry ford of about one foot per hour for four hours, the dam is not such a dangerous agency as to require warning to one who might be in or near the river at the ford, especially if such person had knowledge of the approximate time and character of the splashes; hence it was not actionable negligence to fail to give warning of a splash.

Appeal from a judgment of the superior court for Chelalis county, Sheeks, J., entered September 12, 1913, dismissing an action in tort, on granting a nonsuit. Affirmed.

Govnor Teats, Leo Teats, Ralph Teats, and Chas. W. Smith, for appellants.

W. H. Abel, for respondent.

MOUNT, J.—The plaintiffs brought this action to recover damages on account of personal injuries to Mrs. Berryman by reason of the alleged negligence of the defendant. On the trial of the cause the court sustained the defendant's motion for nonsuit on the ground that no actionable negligence was shown. The plaintiffs have appealed from the order dismissing the action.

It appears that the plaintiffs own an eighty-acre tract of land, upon the East Hoquiam river. This river runs through the plaintiffs' land. About four miles above the plaintiffs' land, the defendant has operated a splash dam for more than twenty years. This splash dam is approximately thirty-eight feet high, and contains three gates, each being about eleven feet wide. When the water above the dam is raised a certain distance, the gates open automatically and allow

¹Reported in 141 Pac. 765.

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the water which has accumulated above the dam to flow down the stream. This is called a splash, and is used for the purpose of floating logs down the stream. These splashes occur every three or four days.

Mr. and Mrs. Berryman live on one side of the river and have a pasture upon the opposite side. Their house is close to the river's bank. The river at the point near the house is nearly dry in the summertime when the water is being retained in the dam. One can walk across without getting wet. There is a roadway across the river at this point which is called a ford. The distance between the banks at this point is about two hundred feet. Standing on the bank at or near the ford, a person can look up the river a distance of two or three hundred feet. When a splash is coming, one can hear it when it gets within four or five hundred feet. The evidence varies as to the rate the water runs during a splash. Some of the witnesses testified that it runs between eight and nine miles per hour. These witnesses, however, had not measured the rate of speed of the water. One witness testified that he had measured it, and the water ran thirty-nine feet in half a minute, which, of course, is much less than a mile an hour. It is not clear from the testimony of this witness whether he measured the speed of the water when it was running at its greatest speed, or whether he measured it at ordinary water. But we may assume, for the purposes of this case, that the water ran at about the rate of eight or nine miles per hour. The evidence also shows that, when these splashes were running, the water rose within the banks of the river at this ford three or four feet in about four hours time.

On the 20th day of July, 1912, in the evening, Mrs. Berryman went over to the pasture to drive some cows home. She took her baby, who was a little over two years old, down near the ford and left it there. She crossed the river bed, in which there was very little water, and started one of her cows across toward home. She was about thirty feet from the crossing when she heard the roar of the water coming down

the river. She immediately thought of her baby on the opposite side and, instead of going back to the ford, she jumped over a bank about nine feet high, and was injured. Mr. and Mrs. Berryman had lived at this place for a period of about four years. They of course knew the character of the splashes that were being made, the volume of water which would come down the river, and approximately when the splashes would occur. Mr. Berryman, a year or so prior to the time of the accident, had requested the defendant company to put in a telephone at his house so that he might be notified when the splashes would occur; but the defendant company refused this request.

It is argued by the appellants that the respondent was negligent in not notifying the appellants when a splash was about to occur, and that these splashes were dangerous to persons and stock which might be in or about the river when the splash came. It is true, these splashes were due at irregular intervals, depending, no doubt, upon the amount of water in the stream. And it is true that the appellants had a right to be crossing the river with stock or by themselves. But we are satisfied that these splashes, even though they occurred at irregular intervals, and when occurring the water rushed down the river at a rate of eight or nine miles per hour, did not constitute a dangerous agency. The evidence shows that, even though the water ran at the rate of eight or nine miles per hour, it did not come down the stream in a solid mass, but came down gradually, attaining its greatest depth in about three or four hours' time. It was not dangerous because the oncoming of the water could be heard for a distance of three or four hundred feet before it reached a given point, and then rose gradually from practically no water until it became three or four feet deep. The appellants knew these facts from an experience of at least four years' observance thereof. If one were in the river when a splash was coming, there was ample time for escape. If one was across the river, as Mrs. Berryman was, there was ample

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time to get back before the waters became dangerous. There were no logs in the waters as they passed the Berryman place. The evidence shows that the logs were all placed in the river bed below their place at the time of the accident.

Ordinarily it would not be supposed that the accident which happened in this case would be likely to take place. Mrs. Berryman left her infant child on the bank of the river near the ford, and crossed over to the pasture on the opposite side. When she heard the water coming, she evidently thought of her child, but instead of going back to the ford, which was but thirty feet away, she jumped over a bank about nine feet high, and sustained the injuries complained of. The water from the splash dam did not cause her injury, but it was caused, according to her own testimony, by jumping over the bank.

The cases relied upon by the appellants are not in point. The use of giant powder is clearly a dangerous agency. A railroad train at a crossing running at a high rate of speed is also a dangerous agency. It is the duty of persons using such dangerous agencies to warn people who may be in jeopardy. But where water is running down a stream at the rate of eight or nine miles per hour, and rises at the rate of about one foot per hour, this is not such a dangerous agency as requires a warning to one who may be in or near the river at about the time these splashes occur. In view of the fact that the appellants had knowledge of the approximate time and character of the splashes, they were not, as a matter of law, entitled to special notice when such splashes were about to occur. We are of the opinion, therefore, that the court properly ruled that there was no negligence shown on the part of the respondent.

The judgment is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11886. Department One. July 9, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. PETE MULLER,
Appellant.¹

EVIDENCE—JUDICIAL NOTICE. The courts will take judicial notice of the fact that in large and populous counties there are many units within the local option law.

INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—INFORMATION—SUFFICIENCY—CERTAINTY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 6309, providing that it shall be unlawful to bring intoxicating liquor into any unit in which the sale is prohibited, and § 6310 prescribing the requisites for indictments and informations, dispensing with particular statements in various particulars, such as descriptions of the place and names of the persons to whom sales are made, an information for bringing liquor into a dry unit in a certain county is insufficient where it fails to allege in which one of several dry units the offense was committed, in view of Const., art. 1, § 22, giving the accused the right to demand the nature and cause of the accusation, and in view of the clause in § 6310, referring to "the unit where the violation is alleged to have occurred."

SAME. In such a case, it is immaterial and unnecessary to state from what place the liquor was brought into the dry unit.

SAME—INFORMATION—GUILTY KNOWLEDGE. An information charging that defendant unlawfully and wilfully brought liquor into a dry unit, sufficiently alleges guilty knowledge and evil intent.

SAME—INSTRUCTIONS—ELEMENTS OF OFFENSE. Under the local option law making knowledge an essential element of the offense of bringing liquor into a dry unit, it is error to refuse to instruct the jury that guilty knowledge on the part of the accused was one of the elements of the offense, to be proved beyond a reasonable doubt, to warrant a conviction.

Appeal from a judgment of the superior court for Island county, Ralston, J., entered November 24, 1913, upon a trial and conviction of violating the local option law. **Reversed.**

James Zylstra, for appellant.

D. W. Craddock, for respondent.

¹Reported in 141 Pac. 910.

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ELLIS, J.—The defendant was arrested upon an information charging:

“That on or about the third day of July, 1913, in the county of Island, State of Washington, the said defendant, Pete Muller, then and there being, did then and there unlawfully and wilfully bring into a unit of Island County, State of Washington, within which the sale of intoxicating liquor was then and there unlawful and prohibited by law, intoxicating liquor, to wit: more than one gallon of spirituous liquor, contrary to the statute in such case made and provided and against the peace and dignity of the state of Washington.”

To this information, the defendant demurred. The demurrer was overruled. The defendant pleaded not guilty, was tried, and, by the jury, found guilty as charged. He thereupon moved for a new trial, which was denied. A motion in arrest of judgment was then interposed. This also was overruled. Judgment was entered upon the verdict, and the defendant was sentenced to pay a fine of \$100 and costs. He prosecutes this appeal.

We shall not notice the particular grounds of the demurrer and the motions for a new trial and in arrest of judgment, nor the many assignments of error, further than to say that they are sufficient to present three contentions, to which the appellant mainly confines his argument, and a consideration of which must be decisive of the case. They are as follows: (1) That the information does not substantially conform to the requirements of the law; (2) that the facts charged do not constitute a crime; (3) that the court committed prejudicial error in his instructions to the jury.

I. It is contended that the information does not substantially conform to the legal requirement of certainty, in that it fails to name the particular unit into which the liquor, if any, was brought. The information was drawn under Rem. & Bal. Code, § 6309 (P. C. 267 § 63), defining the crime, and § 6310 (P. C. 267 § 65) prescribing the requisites of the information or indictment. Section 6309 so far as here

material, in substance, provides that it shall be unlawful for any person to bring any intoxicating liquor into "any unit in which the sale of intoxicating liquor is forbidden under the provisions of this chapter" (Chap. 81, Laws of 1909, p. 153), and that "Whoever shall . . . knowingly violate any of the provisions of this section shall, upon conviction thereof, be fined," etc. These provisions are followed by certain provisos not here involved. It will be noted that the information practically follows the language of the statute. It is charged that the appellant brought intoxicating liquor into "a unit of Island county" in which the sale of such liquor was then and there unlawful and prohibited by law. No particular unit is specified. The evidence shows that, within the contemplation of the local option law, there are three units in Island county (Rem. & Bal. Code, § 6292; P. C. 267 § 29), and that two of these units were, on July 3, 1913, "dry" units. We take judicial notice of the fact that, in the larger and more populous counties of the state, there are many units. But for the next section (§ 6310), prescribing the requisites of the information or indictment, there could be no question that this information would be insufficient. The statute defines the crime by the use of the generic term "a unit." In such a case, an information using the same generic terms of the statutory definition is insufficient, as stating a conclusion. It must be more specific than the statute and state such particulars as will bring the act of the person charged within the generic terms, and notify him of the specific act charged. Our constitution, art. 1, § 22, declares:

"In criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him . . ."

In *United States v. Cruikshank*, 92 U. S. 542, 557, 558, a leading case upon this subject, the supreme court of the United States, touching the similar provision in the Federal constitution, said:

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"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook*, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

It seems clear, therefore, that our constitutional provision, which is couched in almost the same terms as the similar provision of the constitution of the United States, requires that the information in this case, notwithstanding the general terms of the statute, should state the particular unit into which it is intended to charge the appellant with having brought intoxicating liquor. The state, however, contends that this particularity of allegation is wholly dispensed with by Rem. & Bal. Code, § 6310 (P. C. 267 § 65) prescribing the essentials of the indictment or information. That section reads as follows:

"Prosecutions for violations of this chapter may be by information or indictment. In any such prosecution it shall not be necessary to state the kind of intoxicating liquor sold,

nor to describe the place where sold, nor to show the knowledge of the principal in order to convict for the acts of any agent or servant, nor to state the name of any person to whom such liquor is sold, nor to set forth the evidence showing that the required number of qualified electors petitioned for the submission to the electors of the question whether intoxicating liquor should be sold *in the unit where the violation is alleged to have occurred*, nor that a majority of the qualified electors voted against the sale of liquor within such unit, but in all cases it shall be sufficient to state that the act complained of was committed in a unit in which the sale of intoxicating liquor was prohibited, and that such act was then and there prohibited and unlawful."

In construing this section, it is, of course, our duty to so construe it as to make it constitutional if its words are capable of such a construction. We think they are. It is a general rule of criminal procedure that indictments for the illegal sale of intoxicating liquors must be drawn with such a degree of legal certainty as to identify the particular transaction complained of, in order that the court may be able to judge whether the facts alleged are sufficient in law to enable the accused to know exactly what charge he is called upon to meet and to enable him to plead a judgment in bar of another prosecution for the same offense. 23 Cyc. 216; Wharton, Criminal Pleading & Practice (9th ed.), § 166. In enacting the above quoted section, the legislature will not be presumed to have intended an unnecessarily radical departure from well established rules of criminal procedure, Where the language used is capable of a construction authorizing a less radical departure, and still such a departure as meets the reasonable necessities of the subject-matter, that construction will be adopted. In other words, where the statute authorizes any departure from such well established rules, it will be construed as authorizing only such departure as is necessary to meet such necessities if the language used is capable of the narrower construction.

An analysis of the above quoted section will show that its

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language is capable of the narrower construction and that it will still meet the reasonable purposes of the section. It was clearly intended to dispense with the necessity for alleging in the information the kind of intoxicants, the particular place—that is, the premises where the intoxicants were sold, knowledge of the principal of the acts of his agent, or a compliance with all of the formalities necessary to render the local option law operative in the given unit. It was not intended to dispense with the necessity of designating that unit with such reasonable certainty as to enable the person charged to know the exact offense with which he was charged. That some definite unit was intended to be particularly designated in the information is shown by the language which we have italicized in our quotation. The final clause of this section must be construed with reference to the part which precedes it. The use of the indefinite generic words, “a unit” therein, should not be construed as doing away with the clear implication that the particular unit should be designated, found in the clause dispensing with the allegation of petition and submission of the question of local option to the electors “in the unit where the violation is alleged to have occurred.” Since any other construction of this section would render it of doubtful constitutionality and would clearly run counter to the general rules of criminal pleading, we hold that § 6310 does not dispense with the necessity for designating in the information the particular unit into which it is intended to be charged that the person accused brought the intoxicating liquor.

We have been cited to no decision in this state, and have found only one which lends even colorable support to the contrary view. In *State v. Krug*, 12 Wash. 288, 41 Pac. 126, the statute defining the crime of embezzlement of public funds by an officer, Rem. & Bal. Code, § 2812, defined the crime in general terms. Section 2813, prescribing the allegations and proofs necessary, authorized a designation of the crime in the general terms of the defining statute “with-

out specifying any further particulars in regard thereto." The indictment charged the crime in the broad language of the defining statute. This court held the indictment sufficient, for the reason that, because of the peculiar nature of the crime, it would be a practical impossibility to allege with certainty the exact acts and processes whereby the crime was committed. It is therefore said:

"The legislature, doubtless recognizing the fact that it is exceedingly difficult to convict for embezzlement in cases of this kind where the ordinary rules of criminal practice obtain, sought, in the interest of justice, and at the same time without depriving the defendant of any material right, to formulate a statute which would render easy the administration of justice, and under which the real facts in the case could be ascertained. This provision of the law may well be sustained, at least so far as its application goes to officers who, under the law guiding and directing their duties, have sufficient notice furnished them by an indictment drawn under this statute."

This language clearly shows that the court regarded the statute as necessary to the practical administration of justice in such embezzlement cases, and sustained the indictment accordingly. It is only where such necessity exists that such a statute should be held constitutional or such an indictment sustained. In the case here, no such necessity is found, and the statute itself is capable of the construction requiring the more particular allegation. These considerations, we think, make a clear distinction between this case and the *Krug* case, and render the decision in that case inapplicable to the statute here involved.

We find no merit in the claim that the information was void for uncertainty for the further reason that it did not state the place from which the liquor was brought into the prohibited territory. The particular unit into which it was brought was the material thing. Where it came from was immaterial.

II. It is urged that the information does not charge the

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commission of a crime, within the purview of the statute, in that it does not allege guilty knowledge on the appellant's part. The information does, however, charge that he did "unlawfully and wilfully" bring into the unit, etc. These words are sufficient to charge guilty knowledge and evil intent. He could not unlawfully and wilfully do the act without knowing the character and quantity of the liquor and where he was taking it. To allege the one necessarily implies the other and negatives every exculpatory motive. *State v. Zenner*, 35 Wash. 249, 77 Pac. 191; *State v. Barker*, 43 Wash. 69, 86 Pac. 387.

III. The statute defining the crime makes knowledge on the part of the offender an essential element of the offense. This element was sufficiently charged in the information, but was nowhere sufficiently covered by the instructions. A specific instruction, designating and requiring the jury to find every other statutory element of the offense, beyond a reasonable doubt, in order to a conviction, was given. The elimination of the element of knowledge could hardly fail to convey the impression that knowledge or lack of knowledge was immaterial. We cannot assume that a later general instruction to the effect that the burden was on the state to prove by competent evidence, beyond a reasonable doubt, every material fact, as set forth in the information, was calculated to remove this impression or had such an effect. A specific instruction covering this point was requested and refused. This was prejudicial error. 2 Thompson, Trials, § 2328; *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906.

The information should have designated the unit into which it was intended to charge that the liquor was brought. The instructions should have included guilty knowledge as an essential element of the offense.

The judgment is reversed.

Crow, C. J., MAIN, GOSE, and MORRIS, JJ., concur.

[No. 11848. Department One. July 11, 1914.]

FIRST NATIONAL BANK, *Respondent*, v. W. L. DUDLEY,
Appellant.¹

JUDGMENT—DEFAULT—VACATION—GROUNDS—PROCEEDINGS TO COMMENCE ACTION—DELAY. Under Rem & Bal. Code, § 220, providing that an action may be commenced either by the service of a summons or filing a complaint, a delay of three years in filing the complaint after commencement of the action by the service of a summons and copy of the complaint, does not deprive the court of jurisdiction to enter a default judgment, or warrant the vacation of the default, where there had been no appearance by the defendant.

Appeal from an order of the superior court for King county, Smith, J., entered October 3, 1913, denying a motion to vacate a judgment. Affirmed.

James M. Palmer, for appellant.

James Kiefer, for respondent.

MAIN, J.—This is an appeal by the defendant, W. L. Dudley, from an order of the superior court overruling a motion to vacate and set aside a judgment.

On August 5, 1910, as shown by the sheriff's return, the appellant was personally served with a summons and a copy of the complaint in an action in which he was a party defendant. Nothing further appears to have been done in connection with the prosecution of the action until the 3d day of October, 1913, on which date the complaint was filed with the clerk of the superior court and a default judgment entered against the appellant. Prior to the entry of the judgment, the appellant had not in any manner appeared in the action. On October 18, 1913, a motion was interposed to vacate and set aside the judgment. This was the

¹Reported in 141 Pac. 884.

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Opinion Per MAIN, J.

appellant's first appearance. This motion was based upon the claim that the judgment was void because more than three years had elapsed between the date of service of process and the date of filing the complaint and entry of judgment.

The only point presented upon this appeal is whether the court had jurisdiction to enter the judgment on October 3, 1913. It is claimed that the respondent had remained inactive for an unreasonable length of time after service of the summons and a copy of the complaint; and that, therefore, there was an abandonment of the action, and that the court was without jurisdiction to enter the judgment. This contention seems to overlook the provision of the statute relative to the manner in which an action in the superior court may be commenced. By Rem. & Bal. Code, § 220 (P. C. 81 § 181), it is provided:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as herein-after provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint."

Under this section of the statute, an action may be commenced in the superior court, either by service of a summons or by filing a complaint with the clerk of the court. In the present action, as already noted, the action was begun by service of a summons and a copy of the complaint. This gave jurisdiction of the appellant. The fact that there was a delay of more than three years in the filing of the complaint would not divest that jurisdiction and deprive the court of power to enter the judgment after the filing of the complaint. Had the appellant appeared prior to the entry of the judgment and moved the court to dismiss the action

because of the delay in its prosecution, a different question would be presented. *Snohomish Land Co. v. Blood*, 40 Wash. 626, 82 Pac. 988; *Peirce v. National Bank of Germantown*, 44 Wash. 404, 87 Pac. 488. In the case last cited, speaking upon this question, it was said:

“Had the defendant, after the lapse of a reasonable time, and before judgment was finally entered, moved the court to dismiss the action for want of prosecution, doubtless the court would have been justified in granting the motion, especially in the absence of a showing that there was some just cause for the delay. And it may be that the trial court would have been justified, on its own motion, in refusing to enter judgment after so long a delay, at least, until further notice was served on the defendant. But after judgment is entered, we think the defendant’s right to have the action dismissed for mere delay is foreclosed, and that any successful attack on the judgment must be based on grounds that would have required its vacation if entered when the action first became ripe for judgment. Any other rule, it seems to us, would result in uncertainty, as there could be no way of determining whether a given judgment was void or valid.”

The judgment will be affirmed.

Crow, C. J., ELLIS, CHADWICK, and Gose, JJ., concur.

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Opinion Per Gose, J.

[No. 11860. Department One. July 11, 1914.]

EILERS MUSIC HOUSE, *Appellant*, v. E. L. FAIRBANKS *et al.*,
Respondents.¹

SALES — CONDITIONAL SALES — CONSIGNMENT TO AGENT. Where pianos were consigned to agents to be sold at stated prices, and returns made on sales in cash or approved notes of the purchasers secured on the instruments sold, and goods not sold within 90 days to be subject to the principal's orders, the transaction was a consignment for sale upon commissions, and not a conditional sale, within Rem. & Bal. Code, § 3670, requiring conditional sales to be filed for record.

FACTORS — POWERS — TITLE TO PROPERTY — SALE FOR PREEXISTING DEBT. A factor of goods consigned for sale on commission cannot sell or pass title in consideration of a preexisting debt, regardless of whether the purchaser had notice that he was a factor; innocent purchasers not being protected where they acquire goods of a factor outside of accustomed methods.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 8, 1913, dismissing an action of replevin, upon granting a nonsuit. Reversed.

E. P. Whiting, for appellant.

Walter Metzbaum, for respondents.

Gose, J.—This is an action of replevin, brought by the plaintiff to recover the possession of a Marshall & Wendall piano which, at the time of the commencement of the action and at the time of the trial, was in the possession of the defendants. At the close of the trial, the court granted a motion for a nonsuit, and a judgment was entered dismissing the action. The plaintiff has appealed.

The appellant claims that it consigned the piano to F. O. H. Goodman and E. G. Helgesen, for sale in accordance with the terms and conditions of a certain written contract whereby Goodman and Helgesen acted as its factors

¹Reported in 141 Pac. 885.

in the sale of the goods consigned. The contract which the appellant accepted, and under which the piano in question passed from the possession of the appellant, is, in substance, as follows: Goodman and Helgesen, on May 6, 1912, addressed a letter or order to the appellant, in which they say:

"We will take from you a consignment at Seattle . . . 100 player pianos of the Marshall & Wendall make . . . at the agreed price of \$360 f. o. b. Seattle, including player piano bench with each player, *which we agree to sell* at not less than your stock price of \$650 without having your written consent so to do. . . . We agree to order and sell exclusively for you . . . We will keep all goods in our hands fully insured and have policies in case of loss made payable to you and deposit such policies with you. We will pay all taxes levied on such goods as you may consign to us while the same are in our hands or possession. Our consignment account shall at no time exceed \$8,000. Instruments consigned to us shall be subject to your order after 90 days from date of shipment to us, and we also agree to pay you in cash on the first of each month interest at the rate of six per cent per annum on the billing price of all goods and instruments remaining on our hands longer than ninety days from date of shipment. We will endeavor to sell all instruments consigned to us within sixty days from the date of shipment to us, and will promptly remit to you cash or approved customers' contract notes which will always be subject to your approval with security on the instruments sold. . . . For the purpose of forming the basis upon which our compensation is to be fixed for the sale of such instruments and attending to collections or whatever else you may call upon us to do, instruments are to be invoiced to us as agents, at prices as above stated, and we agree that our compensation and commission hereunder shall be such sum or sums as we may sell said instruments for in excess of such billing. . . . We will send you a report on the first day of each and every month of all instruments remaining unsold and make prompt returns as soon as sales are made."

The whole tenor of the instrument shows that the goods were to be consigned for sale upon commission, and that

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Opinion Per GOSZ, J.

there was no conditional sale, because the contract does not create the relation of vendor and vendee. *Childs v. Waterloo Wagon Co.*, 37 App. Div. 242, 57 N. Y. Supp. 520; *National Cordage Co. v. Sims*, 44 Neb. 148, 62 N. W. 514. In the *Sims* case, the court, in construing a similar contract, observed that the distinction between conditional sales and consignments of personal property by a principal to a factor for sale upon commission has been frequently overlooked by both textwriters and judges. It quoted approvingly from Newmark on the Law of Sales, § 19, as follows:

"Whenever it appears from the contract between the parties that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked legal title thereof, solely for the purpose of securing payment of the price agreed upon between them, the contract is necessarily a conditional sale and not a bailment."

The court further said that the conditional sales statute contemplates only cases in which the relation of vendor and vendee exists; that is, where the title to property involved is intended to pass from one party to the other upon the performance of the condition named. The court further said that a consignment of goods under a contract providing that the consignee shall receive them and return periodically to the consignor the proceeds of sales at prices agreed upon or charged by the latter, is not a conditional sale but a transaction of principal and factor. In the *Childs* case, a similar contract was construed as a consignment of goods to a factor to be sold upon commission, and not a conditional sale.

After the piano in question had been consigned to Goodman and Helgesen, the latter, with the consent of the former and with the consent of the appellant, withdrew from the business, and the business was continued in the name of Goodman. About two months later, Goodman sold the piano to Helgesen, giving him possession, the consideration being a preexisting debt owed by Goodman to Helgesen and

the transfer from Helgesen to Goodman of a conditional sale contract for another piano. Some five months later, Helgesen entered into a contract with the respondents whereby he agreed to sell them the piano, they paying twenty-five dollars in cash and agreeing to pay the remainder in installments, title being retained by Helgesen.

It is the settled law that a factor can neither pledge the goods of his principal, nor dispose of them by way of exchange or barter, nor sell them for a prior debt.

"Whenever the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case it is wholly immaterial whether the person dealing with the factor knew him to be such or not." *McCarthy v. Crawford*, 238 Ill. 38, 86 N. E. 750, 128 Am. St. 95, 29 L. R. A. (N. S.) 252.

"In the absence of statutes which furnish protection to persons dealing with factors, the principal can recover his property wherever he can trace it as distinct from that of the factor into whomsoever's hands it may have come. He is entitled to recover the specific goods themselves if they can be had, and if the goods themselves cannot be recovered he may recover their proceeds if they can be traced. Thus if a factor barter his principal's goods in a manner not authorized by the principal and not within the ordinary modes of transacting business, the principal may follow and reclaim the property whether the person dealing with the factor knew him to be such or not. But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods the principal cannot reclaim them. The principal may recover goods or the proceeds of a consignment of a person to whom they were turned over in the payment of an antecedent debt due from the factor. If goods are wrongfully taken from the possession of a factor by an officer the owner may recover them back." 19 Cyc. 174, 175, subd. (e).

See, also, *Childs v. Waterloo Wagon Co.*, *supra*; and *Warner v. Martin*, 11 How. 209. This rule applies to a purchaser without notice from one who has acquired pos-

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session of property from a factor through barter or exchange or in consideration of a preexisting debt. *Warner v. Martin, supra*. This is true because one who purchases from a factor in consideration of a preexisting debt, or in part consideration of a preexisting debt and barter or exchange, acquires no title; and having no title, can pass none. This rule, of course, is subject to the equitable principles of estoppel where the facts are such as to bring the case within them; but there are no such facts present in the case at bar.

The contention of respondent that the contract in question is a conditional sale within the meaning of Rem. & Bal. Code, § 3670 (P. C. 349 § 35) as construed in *Eisenberg v. Nichols*, 22 Wash. 70, 60 Pac. 124, 79 Am. St. 917, is not sound. The statute is that "all conditional sales of personal property or leases thereof containing a conditional right to purchase" etc., where the property is placed in the possession of the vendee, shall, unless a memorandum of the sale is filed for record, be absolute as to the classes therein named. The contract under review is not a contract for a conditional right to purchase, but is a mere consignment of goods by a principal to a factor to be sold upon commission.

The judgment is reversed, with directions to proceed in harmony with this opinion.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11904. Department Two. July 11, 1914.]

**THE CITY OF MONTESANO, *Plaintiff and Appellant*, v.
F. L. CARR, *Defendant and Appellant*.¹**

ACTIONS—DISTINCTION BETWEEN LAW AND EQUITY. The statutory abolition of the distinction between actions at law and in equity does not relieve the courts of the necessity of recognizing the inherent distinctions as an aid in the determination of the rights of a party.

CORPORATIONS—INSOLVENCY—UNPAID STOCK SUBSCRIPTIONS—ACTIONS—RIGHTS OF CREDITOR. A single creditor of an insolvent corporation cannot maintain an action at law, for plaintiff's exclusive benefit, against a stockholder to recover on his unpaid stock subscription.

SAME—ACTIONS—LAW OR EQUITY—PRAYER OF COMPLAINT. An action at law by one creditor of an insolvent corporation to recover the unpaid subscription of a stockholder is not to be converted into an equitable action for the benefit of all the creditors by a prayer in the complaint for such other relief as may be just and equitable, especially where the plaintiff insists upon a money judgment for its exclusive use and benefit.

Cross-appeals from a judgment of the superior court for Chehalis county, Irwin, J., entered September 20, 1913, in an action by a creditor to recover an unpaid subscription to the capital stock of an insolvent corporation, after a trial to the court. Reversed.

O. M. Nelson, for appellant City of Montesano.

Morgan & Brewer and *Gordon & Easterday*, for appellant Carr.

PARKER, J.—As we proceed, we think it will appear that this cause was commenced and prosecuted to final judgment in the superior court by the plaintiff city as a pure action at law, seeking only recovery, for its own exclusive use and benefit, of a personal money judgment against the defendant Carr. The city seeks recovery of such judgment against Carr upon the ground that it is a creditor of the Monte-

¹Reported in 141 Pac. 894.

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sano Planing Mill Company, an insolvent corporation, and that Carr is indebted to that company in the sum of \$1,000 for an unpaid stock subscription made by him to its capital stock.

After trial before the court without a jury, a personal money judgment was rendered by the court against Carr, not in favor of the city for its own use and benefit, but in favor of the creditors of the Montesano Planing Mill Company, including the appointment of a receiver for that company, to enforce payment of the judgment by execution, if not voluntarily paid by Carr, and distribute the proceeds thereof among the creditors of the Montesano Planing Mill Company. Carr has appealed from the judgment, seeking reversal thereof, upon the ground, among others, that the trial court erred in permitting the city to maintain an action for its own benefit, and in rendering the judgment, in view of the fact that the cause was commenced, and at all times prosecuted by the city, as a law action for its exclusive use and benefit. The record before us plainly shows that Carr is entitled to here urge reversal of the judgment upon these grounds. The city has also appealed from the judgment, seeking reversal thereof and the rendering of a judgment in its favor against Carr for its exclusive use and benefit.

The facts determinative of the city's right to maintain this action we may regard as not in dispute. It is of no material consequence here whether we regard the question as being presented by the claim of error made by counsel for Carr on the trial court's overruling of his demurrer to the city's third amended complaint or by the claim of error made by counsel for Carr in the rendering of the judgment by the court upon the evidence presented at the trial. The controlling facts touching this question may be summarized as follows:

The Montesano Planing Mill Company is a domestic corporation of this state. In December, 1909, it became in-

solvent, and passed into the hands of a receiver appointed by the superior court of Chehalis county for the purpose of winding up its affairs, reducing its assets into money, and distributing the same to its creditors. The receiver proceeded accordingly, administered his trust to completion, as he and the court evidently then thought, resulting in the payment of a dividend of eight per cent to the creditors, and the discharge of the receiver by the court in January, 1911. The city became a creditor of the Montesano Planing Mill Company by reason of being compelled to pay for certain lumber used in a public improvement which had been constructed by the Montesano Planing Mill Company for the city, because of the failure of that company to pay for the lumber, the city having previously paid that company for the construction of the improvement. Just when the city thus became a creditor of the Montesano Planing Mill Company is not rendered certain by the record before us, though we assume, for argument's sake, as counsel insist, that the city became such creditor after the discharge of the receiver. The city has not reduced its claim against the Montesano Planing Mill Company to judgment. This action constitutes its first effort to secure payment of its claim.

Thereafter, in November, 1910, the city commenced this action against Carr, as sole defendant, resting its claim upon the facts we have summarized and assumed as true, as claimed by counsel for the city, and also upon the alleged fact that Carr is indebted to the Montesano Planing Mill Company in the sum of \$1,000, and interest thereon, upon an unpaid subscription made by him to the capital stock of that company. The entire prayer of the city's third amended complaint, the one upon which the trial proceeded after the overruling of Carr's demurrer thereto, reads as follows:

"Wherefore plaintiff prays for judgment in the sum of \$1,687.44, with interest thereon at six per cent. against the said F. L. Carr, and for such other and further relief as to the court may seem just and equitable."

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So far as our law recognizes a distinction between an action at law and a suit in equity, it is manifest that counsel for the city has, at all times up to the moment of rendering judgment in this action, prosecuted the same upon the theory that this is a pure law action. Indeed, his very appeal to this court but emphasizes this fact, wherein he is still seeking a personal money judgment against Carr, and insisting that the trial court erred in not awarding the city such a judgment upon the trial for the exclusive use and benefit of the city. At no time has counsel for the city waged the action in the interest of the other creditors of the insolvent Montesano Planing Mill Company, nor is there anything in the record suggesting that the action would assume this form until after the trial and submission of the cause to the court for final decision, when the court, of its own motion, rendered the judgment against Carr and in favor of the creditors generally of the Montesano Planing Mill Company, appointing a receiver to enforce payment of the judgment, and distribute the proceeds thereof among such creditors. Carr has not been called upon at any time from the beginning to the end of this action to defend against the rendition of a judgment of the nature here entered against him by the court of its own motion.

While the distinction between actions at law and suits in equity as to the mere form no longer exists in this state, the courts nevertheless are, of necessity, compelled to recognize certain inherent distinctions between them. *Thompson v. Caton*, 3 Wash. Terr. 31, 13 Pac. 185; *Distler v. Dabney*, 7 Wash. 431, 35 Pac. 138, 1119; *Barto v. Seattle & International R. Co.*, 28 Wash. 179, 68 Pac. 442; *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436. It is often necessary to recognize this distinction as an aid to the determination of the question of the right of a party to prosecute an action for his exclusive benefit, and this, we think, is the real question here involved.

In the early case of *Burch v. Taylor*, 1 Wash. 245, 24

Pac. 438, this court had occasion to consider the question of the right of a creditor of an insolvent corporation to sue for, and recover the debt due him from the corporation by an action at law against a stockholder of the corporation to the extent of his unpaid stock subscription. The action was so commenced and prosecuted to a personal money judgment rendered against the stock subscriber in a justice court. The defendant appealed to the territorial district court, where the judgment of the justice court was reversed. On appeal from the decision of the district court to this court, the decision of the district court was affirmed upon the theory that an action at law could not be maintained by a creditor of an insolvent corporation against one of its stockholders upon an unpaid stock subscription for the exclusive use and benefit of such creditor. Justice Stiles, speaking for the court, said:

"The main question involved in this case is: Does § 2434 of the Code of Washington authorize an action at law by a creditor of a corporation against a stock subscriber? This inquiry, if determined in the negative, would oust the justice's court of jurisdiction. The second clause of § 2434 is as follows: 'Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise,' which is simply a declaration of the American doctrine of the common law of corporations as held, almost without exception, in the decisions of the courts. *Thomp. Liab. Stockh.*, §§ 25-37; *Cook, Stocks*, § 199, and note 1; *Sawyer v. Hoag*, 17 Wall. 610."

and, after holding that unpaid stock subscriptions are a trust fund for the payment of creditors, continued:

"To enforce a right to participate in a trust fund requires proceedings in equity, unless there be peculiar and explicit statutory provisions to the contrary. So in this class of cases the action must be in equity where the creditor desires himself to be the actor in the proceedings to collect and apply subscriptions. Therefore, in the case at bar, the justice had no jurisdiction of the subject-matter of the action, and the judgment must be affirmed."

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We note that the exact language of the early statute quoted in that decision is preserved as a part of our present law in Rem. & Bal. Code, § 3698 (P. C. 405 § 43), which is, in substance, the same as that found in § 4, art. 12 of our state constitution.

Wilson v. Book, 13 Wash. 676, 43 Pac. 939, was also a law action by a creditor of an insolvent bank, seeking recovery for his own benefit from a stockholder of the bank upon the stockholder's secondary liability; that is, the liability imposed upon the stockholder by § 11, art. 12, of the state constitution, beyond what he might owe upon his stock subscription. The question was there again examined by the court and the former holding adhered to, the trust theory being applied as where the recovery was sought upon an implied stock subscription. Chief Justice Hoyt, speaking for the court, said:

"A method which would allow a single creditor to maintain an action at law against one or more of the stockholders for his own benefit would be so unjust to other creditors and might result in such annoyance to the stockholders, that only the most positive language would justify the courts in holding that the liability might be thus enforced. So to hold would enable one creditor to obtain more than his share of the fund which should be derived from this liability. Not only would such a holding allow a creditor to do this, but under it a stockholder could be subjected to a separate suit at the instance of each one of the creditors of the corporation."

The question was again examined by this court in *Waterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041, and the former decisions adhered to, after earnest argument by learned counsel to induce the court to depart from its former holdings. Our attention is called to the decisions in *Adamant Manufacturing Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *New York National Exchange Bank v. Metropolitan Sav. Bank*, 28 Wash. 553, 68 Pac. 905; and *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598. These decisions

are not in the least inconsistent with the conclusions reached by the court in the above noticed cases. These decisions simply recognize the right of a creditor to maintain a suit in equity in the interest of himself and all other creditors of an insolvent corporation against a stockholder of such corporation, to compel payment of his unpaid stock subscriptions, or payment of the additional liability which the constitution imposed upon him as a stockholder; quite a different matter from the claimed right of a creditor to maintain an action at law for his own exclusive benefit against a stockholder upon his liability to the corporation as such. In the last cited case, at page 669, it is said: "An action of this kind is in the nature of a creditor's bill." While speaking generally, this is a correct statement. We think the real nature of the action is that of a creditor's bill where the plaintiff prosecutes for himself and all other creditors, in view of the fact that he is seeking payment of his claim from a trust fund against which his rights are not preferred, but are the same as other creditors.

We do not overlook the holding of this court in *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807. In that case, the action, it is true, was originally commenced by the creditor against the stockholder upon his unpaid stock subscription for the exclusive use and benefit of the creditor; but, while the case was pending, the plaintiff creditor gave notice to the defendants and filed a written offer, requesting that an order be entered in the cause, substituting one Beach, the receiver of the corporation, as plaintiff, Beach having been appointed receiver of the corporation pending the action, in another action, and offering to assign any judgment recovered in the action to the receiver, to the end that the proceeds thereof might be equitably distributed among the creditors. This was a voluntary conversion of the law action into an equitable one for the benefit of all creditors before the rendition of judgment in that action. Thereafter, the cause proceeded, and judgment was rendered ac-

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cordingly. The city, plaintiff and appellant in this action, has at no time ever assumed such an attitude. It not only prosecuted this action for its own benefit as a pure law action up to the very moment of the rendition of the judgment, but continues in that attitude by appealing from the judgment rendered, and claiming error on the part of the learned trial court in not rendering judgment in its favor for its own exclusive use and benefit. We are of the opinion that the city has no legal right to maintain this action. The decisions of this court in *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Mitchell v. Jordan*, 36 Wash. 645, 79 Pac. 311; and *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523, holding that a receiver for an insolvent corporation may maintain an action either at law or in equity to recover from a stockholder upon his liability as such are not inconsistent with the conclusion we here reach. Whatever the nature of the action may be, when prosecuted by a receiver, it is, of course, for the benefit of all creditors of the insolvent corporation.

We have not lost sight of the fact that the city's prayer for a personal money judgment against Carr concludes with the words "and such other and further relief as to the court may seem just and equitable." Whatever construction might be placed upon this language of the prayer, under different circumstances, it seems to us quite plain that it does not result in converting this action into an equitable action for the benefit of the city and the other creditors of the insolvent Montesano Planing Mill Company, in view of the manifest theory upon which counsel for the city has waged this action. Indeed, his attitude constitutes, in substance, an assertion that his general prayer for relief had no such meaning. He is still consistently insisting here that the judgment of the trial court was erroneous in so far as it was rendered in favor of the creditors instead of in favor of the city for its exclusive use and benefit.

As to the appeal taken by the city in this cause, little need be said, it being practically disposed of by our discussion

above made, which necessarily leads to the conclusion that the city cannot recover from Carr in the manner here sought upon his unpaid stock subscription if, in fact, he is indebted to the Montesano Planing Mill Company upon that subscription. Other contentions made by counsel for the city upon its appeal, we think, are wholly without merit and do not call for discussion.

If it be suggested that the judgment of the learned trial court was, in any event, a correct disposition of the cause upon the merits, which theory counsel for the city is combating even at this time, we think such suggestion may be answered in the negative by the fact that Carr, as defendant, was not called upon to defend, and was not defending an action calling for any such judgment. We conclude that the judgment must be reversed and the action dismissed.

It is so ordered.

FULLERTON, MORRIS, and MOUNT, JJ., concur.

[No. 11887. Department Two. July 13, 1914.]

J. E. CHILBERG, *Appellant*, v. J. A. COLCOCK *et al.*,
Respondents.¹

EXPLOSIVES—NEGLIGENCE—CAUSE OF EXPLOSION—EVIDENCE—SUFFICIENCY. Recovery for negligence in installing gasoline tanks in a launch, in that a pipe leading to one of the tanks was not properly fitted, is properly denied on the ground that the cause of an explosion, when the tanks were first filled, was not proven but left to conjecture, where it does not appear that any gasoline leaked from the pipe in question, but only that it might have done so, and that the explosion was caused by gasoline leaking on the engine and which might have come from the deck when the other two tanks were filled, or from the supply pipes from one of the other tanks.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 3, 1913, upon

¹Reported in 141 Pac. 888.

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findings in favor of the defendants, in an action in tort, tried to the court. Affirmed.

William Wray, for appellant.

Trefethen & Grinstead, for respondents.

MOUNT, J.—This action was brought to recover damages caused by an explosion on the plaintiff's gasoline launch. The basis of the complaint is that the defendants negligently, carelessly, and unskillfully installed gasoline tanks in the launch. Upon issues joined, the cause was tried to the court without a jury. At the close of the plaintiff's evidence, the court denied a recovery, and gave judgment in favor of the defendants for the work done. The plaintiff has appealed.

It appears that, in July, 1913, the plaintiff owned a small gasoline launch. The engine was located about the middle of the hull. The gasoline tank was located forward of the engine. The hull was decked over by an oval deck from a little aft the engine and extending to the bow. Immediately over the engine, were two doors, swinging on hinges, which doors opened upward, exposing the engine. These doors when closed formed a part of the oval deck. The plaintiff desired to install two additional gasoline tanks, one on each side of the engine, within the covered portion of the launch. The tanks were ordered from the defendants and were supplied by them. At the request of the agent of the plaintiff, one of the defendants' men was sent to install, and did install, the tanks in the boat. This work took several hours. The plaintiff's agent was at the boat during each hour the work was in progress.

After the work was finished, the plaintiff's agent ran the boat to the dock of the Union Oil Works, in Seattle, a distance of about two miles, for the purpose of having the three tanks filled with gasoline. While the tanks were being filled, the engine was left running. The forward tank was

first filled. Then one of the new tanks was filled. In order to fill these tanks, it was necessary to open a deck plate immediately over each tank, which deck plate opened a pipe leading to the tanks. Then a funnel was placed in the opening and a hose carried gasoline into the funnel. When a tank was being filled, the testimony shows that gasoline would bubble out of the tank through the deck plate and run upon the deck of the boat. When the last tank was nearly full, an explosion occurred, which damaged the boat. After the explosion, an examination was made in an endeavor to find the cause thereof. Mr. Dunlap, the agent of the plaintiff, and who had the work done upon the boat, discovered that the pipe which led from the tank to the surface of the deck of the boat, was not screwed into the deck plate, but that the threads had been filed and the pipe forced into the deck plate. The testimony shows this was not a workmanlike way of making this connection, but that the deck plate should have been screwed upon the pipe; and if it had been screwed upon the pipe, gasoline could not have leaked into the body of the boat. This was the negligence and unskillful work which was alleged in the complaint. Another witness for the plaintiff, who examined the boat after the accident, testified:

"The tanks and connections to the engine were so badly deranged by the explosion that I could not tell whether they were properly installed or not."

Mr. Dunlap, the agent of the plaintiff, testified, that the explosion was caused by gasoline leaking on the engine and the magneto ignited the gasoline vapor in the compartment. It is plain from the evidence that this was the cause of the explosion. But it is not shown where the gasoline came from that caused the explosion. It may have come from the deck while the other two tanks were being filled; it may have come from gasoline which was spilled upon the deck when the last tank was being filled; or it may have come

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from a leak in the supply pipes from one of the other tanks. There is no evidence in the record which shows where the gasoline came from which caused the explosion. As was said by this witness, and by other witnesses, "that is conjecture." And the court who heard and saw the witnesses concluded and stated that the evidence failed to disclose how the gasoline which caused the explosion came upon the engine. A careful reading of all the evidence in the case fails to disclose that the cause of the explosion was the improper fitting, if it was improperly made. The rule, in cases of this character, is as stated in *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881, quoting from *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, as follows:

"But there must be some evidence, either direct or circumstantial, that there was negligence on the one side, an injury resulting in damages on the other, and that the injury and damages followed the negligence, and were produced thereby . . . it is not proving his case by circumstantial evidence for the respondent to show that there were causes, for which the appellant would be liable, which could have produced the injury, without showing that it could not have been produced in any other manner, or in any manner for which the appellant would not be liable."

So in this case, it was necessary for the appellant to show, either by positive evidence that the gasoline escaped from this particular fitting, or that the gasoline could not have escaped from some cause for which the respondents would not be liable. It is possible, of course, in this case, that the gasoline escaped from this particular fitting. But it is just as possible that the gasoline escaped from some other cause, and that the explosion was the result thereof, and not of gasoline which escaped from this particular fitting; because it is not shown that any gasoline actually escaped from this particular fitting, or that it could escape. The evidence shows that it might have escaped from this

fitting, but that is as far as it goes. We are satisfied, therefore, that the court properly refused a recovery on the part of the appellant.

The judgment is therefore affirmed.

Crow, C. J., PARKER, and MORRIS, JJ., concur.

[No. 11917. Department Two. July 13, 1914.]

JAMES CAMPBELL FRANEY, *a minor, Respondent*, v.
SEATTLE TAXICAB COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS—STREETS—COLLISION AT CROSSING—NEG-
LIGENT DRIVING OF AUTOMOBILE. The driver of an automobile, who
struck a pedestrian upon a city crossing, while exceeding the speed
limit and without sounding any warning, in violation of a city ordi-
nance, is guilty of negligence rendering him liable for the injuries
sustained.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether
a boy, who got off the end of a wagon at a city crossing and pro-
ceeded to cross the street without looking for approaching automo-
biles, was guilty of contributory negligence, precluding a recovery
for injuries sustained when struck by an automobile going at an ex-
cessive speed, is a question for the jury, where it appears that he
was on the crossing where he had a right to be, and had gone some
distance after getting off the wagon, so that he was in plain view
of the automobile which was following the wagon, as he had a
right to assume that the automobile would not exceed the speed
limit and would pass him without running him down.

APPEAL—REVIEW—DISCRETION—NEW TRIAL. Where the trial court
exercised its discretion in refusing a new trial on conflicting evi-
dence, error cannot be assigned because it appears that the trial
judge's opinion of the evidence differed from the opinion of the
jury, in the absence of any abuse of discretion.

DAMAGES—PERSONAL INJURIES—MEDICAL ATTENTION—INSTRU-
CTIONS. In an action for personal injuries, the jury may consider
the cost of medical attention, although there was no charge made
by the doctor for services at the hospital, or that he had presented
any bill or would do so, where the doctor testified that he treated

¹Reported in 141 Pac. 890.

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the plaintiff after he left the hospital, and, when asked about his bill, had stated that \$500 would be a reasonable charge for the operation.

Appeal from a judgment of the superior court for King county, Humphries, J., entered July 30, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Brightman, Halverstadt & Tennant, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

MOUNT, J.—The plaintiff brought this action by his guardian *ad litem* to recover damages on account of being run down by an automobile in the city of Seattle. He alleged that the defendant was negligent in driving its car at an excessive rate of speed without giving any warning, in violation of an ordinance of the city of Seattle. The defendant denied negligence and alleged contributory negligence of the plaintiff. The case was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$1,500. The defendant has appealed.

It appears from the evidence that the plaintiff was riding upon the rear end of a wagon which was being driven by an acquaintance. The wagon was traveling east up the grade on Jackson street just previous to his injury. Jackson street is a paved street running east and west. It intersects 14th avenue south, which runs in a northwesterly and southeasterly direction. There are double street car tracks on both of these streets. When the plaintiff arrived at the east line of 14th avenue south, upon the south side thereof, he alighted from the rear end of the wagon and started along the usual crossing for pedestrians, northwest across Jackson street. He had traveled but a few feet from the wagon where he had alighted when he was struck by the automobile, which was traveling down the grade westerly along Jackson street. In the accident, the plaintiff's

skull was fractured by the blow, and he was rendered unconscious.

The evidence offered in behalf of the plaintiff tended to show that the automobile was traveling at the rate of twenty-five miles an hour, about a block east of the accident. One witness testified that it was going at a terrific speed at the time of the accident. Another witness testified that, after the automobile struck the plaintiff, it continued running for half a block before it was stopped. The evidence on the part of the plaintiff also tends to show that he had traveled six feet or more upon the crossing after leaving the wagon from which he had alighted and before he was struck by the automobile. Also, that there were no warning signals given of the approach of the automobile. The plaintiff was going upon the usual way traveled by pedestrians in crossing from one side of Jackson street to the other along 14th avenue south. At the close of the plaintiff's evidence, the defendant moved the court for a directed verdict, on the ground that no negligence was shown, and that the plaintiff himself was negligent. This motion was denied, and error is based thereon.

An ordinance of the city of Seattle fixes the maximum speed of automobiles on city streets at twelve miles per hour; and requires drivers of automobiles to sound a warning when approaching any street intersection. It is apparent from the abstract of record brought here that the defendant's automobile was traveling at a greater rate of speed than twelve miles per hour. It was, therefore, guilty of negligence in driving upon this crossing at an excessive rate of speed without blowing the horn or sounding a warning.

It is argued by the appellant that this case is controlled by the rule in *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983, where the plaintiff walked from behind a wagon into the street without looking for approaching automobiles, and was injured. But in that case, Mrs. Harder was not at

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the usual crossing, but was near the middle of the block; while in this case, the plaintiff was upon the usual crossing for pedestrians. And it was the duty of the driver of the automobile, especially when driving at an excessive rate of speed, to observe foot-men upon the usual crossing. It is true, the plaintiff but a moment before had alighted from the rear end of the wagon; and there was testimony on the part of the defendant showing that the plaintiff emerged from the rear end of the wagon immediately before he was struck. But the evidence on the part of the plaintiff shows that he had emerged several feet from the rear end of the wagon and was in sight of the driver of the automobile before it reached the crossing. It was the duty of the driver of the automobile, therefore, to avoid striking the plaintiff; and he clearly violated that duty in this case. The evidence shows that the plaintiff had crossed from the south side of the street to the middle of the street before he was struck. According to the plat introduced in evidence, he must have traveled fifteen feet or more from where he alighted from the wagon before he was struck by the automobile. We are satisfied the trial court properly denied the motion for a directed verdict and submitted the case to the jury.

It is argued that the plaintiff was guilty of contributory negligence in not looking for the automobile. But the evidence shows he was upon the crossing, where he had a right to be. If he had looked and seen the automobile coming, he had a right to assume that the driver would not violate the city ordinance in regard to speed, and at that point would be obliged to pass him without running him down. Whether the plaintiff was guilty of contributory negligence depended upon his surroundings at the time of the accident; and we think this was a question for the jury under all the facts.

The principal defense of the defendant was that the plaintiff ran against the automobile instead of it running against him. Upon motion for new trial, which the court denied, the court made the remark: "It looks to me like the boy ran

over the taxicab." But the court denied the motion for new trial. It is now argued that the court was satisfied the plaintiff was guilty of contributory negligence. The defendant relies upon the following cases: *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108; *Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166. Those were cases where the trial court thought a new trial should be granted but that it had no power to grant a new trial. But we held otherwise, and said that the court should have exercised its judgment and granted a new trial; that it had authority so to do. The granting or refusing of a new trial, where there is conflicting evidence, is discretionary with the trial court. The mere fact that the judge's opinion differs from the opinion of the jury as expressed by the verdict, does not necessarily require him to grant a new trial. *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. 982. In this case, the trial court exercised its discretion and refused a new trial. This was not reversible error.

The court instructed the jury that, if they found for the plaintiff, "you are to award him such sum as you believe will fairly and reasonably compensate him for any injury you believe he has received. You will also include in your award any sum he has paid, or has become obligated to pay, on account of care or medical attention." It is argued by the defendant that, because the doctor who treated the plaintiff in the hospital made no charge for his services at the hospital, there was no evidence of any obligation to pay for medical care and attention. While the doctor who treated the plaintiff at the hospital testified that there was no charge for that service, he also testified that he treated the boy after he left the hospital. The doctor also stated he had been asked about his bill and said \$500 would be a reasonable charge for the operation. It is true there was no evidence that the doctor had presented any bill, or that

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he would do so. But there was clearly some evidence of the fact that the plaintiff was liable to the doctor for services. We think the instruction was not erroneous.

Upon the whole, the case was one entirely for the jury. No error was committed by the trial court, and the judgment is therefore affirmed.

Crow, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11627. Department One. July 13, 1914.]

J. MATZGER, *Respondent*, v. ARCADE BUILDING & REALTY COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF—WAIVER OF BAR—PART PERFORMANCE—ESTOPPEL. A lessor is estopped to question the validity of an unacknowledged lease for a term of five years, where it appears that, to secure the lease, the tenant cancelled a prior valid lease and paid \$2,200 increased rentals for the last eight months of the term thereof, that after the lease had run four years the lessor, on denying an application for a renewal at the end of the term, recognized the lease by telling the agent he could remain for the end of the term (making in effect a new lease for less than a year), and that the lessee, upon the faith thereof, invested \$30,000 in new stock upon which he would sustain a heavy loss if required to move before the end of the year.

PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION. A landlord accepting the benefits of a lease made by its authorized agent in his own name, without questioning its validity, adopts the same as its own, where the principles of equitable estoppel intervene to prevent a denial of its validity for want of acknowledgment.

ESTOPPEL—PLEADING—NECESSITY. Where the facts constituting an estoppel to deny a lease are set forth in the pleadings, and early in the trial the pleader assumed that he relied upon an estoppel to deny the lease, to which no claim of surprise was interposed nor request for a continuance made, the objection that an estoppel was not specifically pleaded is unavailable.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 23, 1913, upon find-

¹Reported in 141 Pac. 900.

ings in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

Beebe & Whitcomb (Peters & Powell, of counsel), for appellant.

Preston & Thorgrimson, for respondent.

ELLIS, J.—The plaintiff, claiming to be the lessee, for a term expiring December 31, 1913, of a storeroom in the Arcade Building, in the city of Seattle, brought this action to enjoin the defendant, the owner of the building, from erecting certain structures in a private alley in the rear of the storeroom, obstructing access of light and air. The defendant denied that the plaintiff had anything but a month to month lease. In order to any understanding of the questions involved, a somewhat detailed statement of the evidence is necessary.

The plaintiff testified that he first went into possession under a lease for two years; that the Moore Investment Company, of which James A. Moore was the manager, then had charge of the building; that, on the expiration of that lease, he received a second lease of the building for a term of six years. This lease, a copy of which is in evidence, was dated January 1, 1904, by its terms ran to January 1, 1910, and was executed by the Moore Investment Company by James A. Moore, its manager. It was not acknowledged. This lease provided for certain lower rentals payable monthly to January 1, 1908, and from then on, during the term, for a rental of \$225 a month. It is undisputed that the plaintiff remained in possession under this lease until within a year of its expiration. The plaintiff testified that, early in January, 1909, when the lease still had less than a year to run, he, being desirous of securing a new lease, went to Moore, who was still managing the building, to secure a new lease; that Moore then informed the plaintiff that, if he would cancel the old lease for the last eight months of its term, he would give a new lease on condition that the plaintiff pay

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\$275 a month increase, or \$500 a month rental for the last eight months of the old lease, and agree to pay \$500 a month for a new lease running for a period of four years, and also purchase from Moore sixty shares of stock in the Irondale Steel Company for \$3,000 cash; that Moore informed the plaintiff that, if he wanted to stay in the building he would have to buy this stock, and that this applied not only to the plaintiff but to every tenant in the building. It is conceded that this stock was practically worthless and the evidence is conclusive that the plaintiff purchased it only to secure the lease.

A lease, which is in evidence, was then drawn and executed in the name of the Moore Investment Company by James A. Moore, its manager. It was dated April 14, 1909, and purported to run for a term of five years from January 1, 1909, to December 31, 1913, and provided for the payment of a monthly rental of \$225 a month for January, February, March and April, 1909, and for a monthly rental of \$500 a month from May 1, 1909, during the remainder of the life of the lease. It provided that no alterations should be made in the premises without the consent of the party of the first part. Like the former lease, this instrument was not acknowledged. Apparently at this time the rent of \$225 a month to May 1, 1909, had been paid, and the plaintiff testified that he cancelled the last eight months of his old lease and paid at that time the increased rental of \$275 a month for the period of eight months, or \$2,200 down, as an inducement to the making of the new lease, and also paid \$3,000 to Moore for sixty shares of stock in the Irondale Steel Company.

The Arcade Building was owned originally by the Arcade Building Company, a corporation, of which one G. Henry Whitcomb was president and the largest stockholder. At the time the new lease was entered into, the name of this corporation had been changed to Arcade Building & Realty Company, of which corporation it is admitted

G. Henry Whitcomb owned at least one-half of the stock. The plaintiff testified that, as a part of the negotiations for the lease here in question, he went to G. Henry Whitcomb and laid the matter before him, seeking to make better terms for the new lease, but Whitcomb said, "I don't think that is too much at all. That doesn't even average \$500 a month, and whatever Mr. Moore does is all right. I don't mix in this at all."

The plaintiff paid the rent from January 1, 1909, to March 1, 1913, by checks payable to the Arcade Building & Realty Company. Many rent bills are in evidence. They are on printed blanks which run in the name of the "Arcade Building Company, Moore Investment Company, agents," up to 1911, and from then on in the name of "Arcade Building & Realty Company." A bundle of checks was also introduced. These checks were payable to the Arcade Building & Realty Company and were indorsed by that company, some to a bank and others to the Moore Investment Company. The plaintiff testified that, as a part of the transaction, he agreed to make alterations in the storeroom; that he went to G. Henry Whitcomb to get permission to make certain changes; that G. Henry Whitcomb asked the plaintiff to put a new front into the storeroom; that the plaintiff did not desire a new front as the old one was satisfactory, so far as he was concerned, and that he put in the new front at Mr. Whitcomb's request. He also testified that he put in certain balconies and mezzanine floors, which, with the new front, cost him \$1,300; that these alterations were made soon after the making of the new lease and all of them were made after consultation with G. Henry Whitcomb, who gave his consent thereto.

The plaintiff testified that he never knew that the validity of his lease was questioned until the notice seeking to terminate it was served upon him, at which time the lease had only about ten months to run. It is admitted that, some time in the year 1911, a son of G. Henry Whitcomb, one

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David Whitcomb, who was a director, vice president, and manager of the Arcade Building & Realty Company, took over the management of the Arcade Building from the Moore Investment Company. The plaintiff testified that he had had several conversations with David Whitcomb in the early part of the year 1913; that, in one of these conversations, Whitcomb proposed to purchase the remainder of the plaintiff's lease, or to arrange a purchase by another tenant occupying an adjoining storeroom who wanted more space; that the plaintiff mentioned a certain figure, and that Whitcomb told him he could not come anywhere near that figure; that about January 15, 1913, the plaintiff approached David Whitcomb, seeking to secure a new lease; that David Whitcomb then told the plaintiff he could stay in the premises until his then lease expired, but that he, Whitcomb, would not consider a new lease, and that plaintiff would have to vacate by January 1, 1914. David Whitcomb denied that he ever recognized the lease as valid. The plaintiff testified that in none of these conversations did Whitcomb intimate that the plaintiff's lease was invalid or that it created only a tenancy from month to month. David Whitcomb did not controvert this, but stated that he always avoided discussing the old lease with the plaintiff. The plaintiff testified that in December, 1912, he purchased goods for the spring trade of 1913 to an amount of fifteen or twenty thousand dollars in value, and that, about two months prior to the commencement of this action, he purchased goods for the fall trade of 1913 amounting to about \$10,000 in value; that, if forced to remove before the expiration of his lease, he could not realize more than thirty-five cents on the dollar for this stock.

David Whitcomb denied that his father was in Seattle at the time the lease was made, but admitted that he, David Whitcomb, knew that some of the leases of rooms in the Arcade Building were made in the name of the Moore Investment Company and others in the name of the Arcade

Building & Realty Company, and stated that, when Moore wanted to give a real, or valid, lease, he made it in the name of the building company. He also testified that improvements made by the plaintiff did not add anything to the rental value of the premises. One of the attorneys for the plaintiff testified that, early in 1913, he called on David Whitcomb to secure an extension of the plaintiff's lease for another period; that the present lease was mentioned, but no reference was made to it by Whitcomb, who stated that the plaintiff would have to arrange to get out at the end of the year 1913, as he, Whitcomb, had arranged to give the space to another tenant. On February 26, 1913, after this action was commenced, the defendant caused notice to be served upon the plaintiff that his tenancy was only from month to month, that it would be terminated as such on March 31, 1913, and demanding a surrender of possession at that time.

The court made no separate findings, but found in the decree that the defendant was estopped to deny that the lease was a valid lease to December 31, 1913, and permanently enjoined the defendant from erecting any structures in the alley such as would interfere with the plaintiff's light and ventilation. The defendant appealed.

The appeal presents two questions: (1) Was the evidence sufficient to establish an estoppel against the defendant to deny the lease for the entire term? (2) Should the judgment be reversed because the court admitted evidence of the estoppel over the defendant's objection?

I. It is, of course, admitted that an unacknowledged lease for a term longer than one year, in the absence of equities sustaining it or estopping a denial of its validity, is void, or at least voidable under the statute of frauds. In this case, there are three elements of estoppel invoked by the respondent: (a) that respondent, on the faith of the lease, and at the time of making it, paid \$2,200 increased rent for the last eight months of his old lease as a bonus

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or consideration going to the entire new term, and at the same time purchased and paid \$3,000 for worthless stock in the Irondale Steel Company as an inducement to the lease; (b) that he put a new front into the storeroom which he did not need and did not want, at the request of G. Henry Whitcomb, who, it is admitted, was the chief stockholder of the appellant, and that he made other improvements for his own benefit, but upon the faith of the new lease as an entirety; that all of these improvements cost the respondent \$1,300; (c) that after David Whitcomb took charge of the building, and early in the spring of 1913, he, Whitcomb, as an officer and manager of the defendant company, and on its behalf, recognized the lease as valid, sought to purchase the remainder of the term, and later, about January 15, 1913, when respondent sought to secure a new lease, told the respondent that he could remain in the building until his lease expired on December 31, 1913, but would then have to vacate; that, acting upon the faith of the lease as a valid lease, the respondent, in December, 1912, purchased fifteen or twenty thousand dollars' worth of stock for the spring trade, and after David Whitcomb's express recognition of the lease as a valid lease to December 31, 1913, the respondent expended \$10,000 for goods for the fall trade, and that an enforced removal would have entailed great loss to the respondent upon all of this stock. On the other hand, the appellant contends that an estoppel can only be raised by one of two things: (a) By entry under the lease and payment of rent in advance for the entire term. (b) By such entry and a making of permanent improvements by the tenant, enhancing the rental value of the freehold.

This court has never held that the payment for the entire term in advance and of the full rent reserved is a requisite to the upholding of an unacknowledged lease or even of an oral lease. On the contrary, it is fairly borne out by our own decisions that the taking of possession by the lessee and the payment of a part of the consideration or performance of

work as a part of the consideration, if such payment or work is a part of the consideration inducing the lease and going to the entire term in addition to the rental to be paid at stated periods throughout the term, constitutes such part performance as to sustain the lease for the entire term. While never announcing the foregoing in so many words, a consideration of our own decisions will show that these elements have largely entered into them and not the single element of improvements made by the tenant increasing the rental value. *McGlaulin v. Holman*, 1 Wash. 239, 24 Pac. 439; *Schulte v. Schering*, 2 Wash. 127, 26 Pac. 78; *O'Connor v. Oliver*, 45 Wash. 549, 88 Pac. 1025; *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871, 132 Am. St. 1071; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

The same rule has been invoked in favor of a lessor who, by reason of an unacknowledged lease, made improvements for the sole benefit of the lessee. *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 109 Pac. 312, Ann. Cas. 1912 A. 1098. This court has held that an oral lease, if good at all, is only good as a lease from month to month or from period to period for which the rent is payable and then only where the tenant has been put in possession (Rem. & Bal. Code, §§ 8802, 8803; P. C. 295 §§ 1, 3), and that, in such a case, the delivery of possession alone is a sufficient part performance to overcome the fact that the lease was verbal and validates the lease as one from month to month without any other element of part performance or estoppel. *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934. This holding is not in necessary conflict with the cases in which oral leases have been held valid for the entire term on facts invoking the principles of equitable estoppel in addition to the fact of delivery of possession to the tenant. This court also, in a case of an oral lease of a farm where the rent was to be one-third of the crop, held that a recognition of the lease and a promise to carry it out made less than a year from the termination of the period, even if not considered as a new lease, would ratify

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the oral lease as one for less than a year, and that the defendant's possession and preparation for the crop was a sufficient part performance to take such oral lease out of the operation of the statute and sustain the lease for the full term. *O'Connor v. Oliver*, and *O'Connor v. Enos*, *supra*. See, also, *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789.

The net result of the foregoing decisions is that an oral lease for a given term is sustained as a lease from month to month upon the bare circumstance of part performance by delivery of possession to the tenant, and may be sustained as a valid lease for the entire term on any state of facts showing a part performance of the consideration going to the entire term, though short of full performance. The lease here involved was in writing and was therefore good for a period of one year. Under the doctrine of ratification, as announced in the case of *O'Connor v. Oliver*, *supra*, and its sequel, *O'Connor v. Enos*, *supra*, a ratification by recognition of the lease as a valid lease within one year from the termination of its purported term, it would seem, ought to have the same effect as a new written lease for less than a year, as the ratification of the oral lease had in the *Oliver* case by the purchaser of the premises, who took with knowledge of the oral lease.

The appellant's argument seems so to construe the doctrine of estoppel as to limit its operation to cases where the estoppel arises from the benefits received by the lessor; that is, where the lessee has so improved the property as to add to its rental value. Though cases in which the estoppels were based upon these circumstances are cited, no case is cited which expressly so limits the doctrine or so limits it by fair implication. The general doctrine of estoppel is much broader than this. It applies not only to estop one who receives and retains a benefit from denying the validity of the transaction from which he receives it, but it also applies to estop one party to a transaction from denying the validity of the transaction which, if not sustained as valid, would

put the other party, who has acted on the faith of the first party's attitude therein, in a materially worse position than he would otherwise have been. *O'Connor v. Oliver, supra*, was clearly a case of that kind. The tenant, having prepared the land and put in the crop, whether it benefited the other party or not, would have been materially damaged by loss of his work had the lease not been held valid for the entire term, notwithstanding the fact that it was verbal. It is a fallacy to assume that, as against the lessor, estoppels can only arise in favor of the lessee by the making of improvements by the lessee on the faith of the lease, beneficial to the freehold, increasing the rental value and which the tenant cannot take away. This is only one side, or, more correctly speaking, one phase of the doctrine of estoppel. We know of no reason, and none has been suggested, why one denying a contract of lease is more immune from the broad principle of equitable estoppel than one who denies any other contract. That the broad principle of equitable estoppel preventing a party to a transaction from asserting its invalidity in any case where the other party, acting on the faith of the first party's attitude touching the contract and its subject-matter, has placed himself in a position where it would be inequitable to hold the contract invalid to his injury applies alike to leases as to other contracts is clearly recognized in *Forrester v. Reliable Transfer Co., supra*, where we said (59 Wash. p. 95):

"This court has heretofore held that there may be such performance of acts referable to a lease contract that its terms will be enforced as though it had been executed with all the formalities prescribed by statute, the same as rights under an informally executed deed will be protected under like circumstances. *McGlauslin v. Holman*, 1 Wash. 239, 24 Pac. 439; *Schulte v. Schering*, 2 Wash. 127, 26 Pac. 78; *Schulte v. Littlejohn*, 2 Wash. 129, 26 Pac. 79; *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871; *Koschnitzky v. Hammond Lumber Co., supra*. These cases involved both unacknowledged and oral leases. All were for terms for more

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than one year, and hence, did not comply with the statute in their execution, yet their provisions were given full force and effect because of the performance of acts with reference to and in the belief that they were binding contracts between the parties."

The language which we have quoted construes our own decisions not as limiting the doctrine of equitable estoppel as applied to the sustaining of contracts of lease, but as recognizing that doctrine as applicable to such contracts with like force and to the same extent as to other contracts. A careful consideration of our own decisions convinces us that what is said in some of them relative to estoppels by improvements made by the tenant beneficial to the freehold was said because that was the only estoppel claimed in the given case, not because that was the only fact which could work an estoppel in any case. In each of the cases called to our attention and chiefly relied on by the appellant where written leases have been held invalid for lack of acknowledgment, there was apparently an absence of sufficient facts invoking the principle of equitable estoppel on any ground. In *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852, it did not appear that the lessee had placed himself in a worse position on the faith of the lease as one for the entire term. The case was decided without the evidence and upon the court's findings alone. By these findings it appeared that the tenant had made insignificant improvements which were held too meager to be construed as a payment of rent in advance going to the consideration of the whole term. We said:

"It, of course, is inferable that such improvements would increase the rental value to some extent, but the amount is conjectural, and as the appellants are relying on an equitable principle, *the burden was upon them to show that they would suffer some material injury if the ordinary rules of law were enforced against them.*"

The language which we have italicized shows that the court had in mind the broad principle of equitable estoppel as ap-

plied to other contracts, namely, benefit on the one side or injury on the other if the contract were not enforced. In *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322, the last part of the opinion clearly shows that, if the purchase by the tenant of the band of cattle from the lessor had not been an independent transaction, but had formed a part of the consideration of the lease, it would have been sufficient to estop the lessor from denying the validity of the lease for the full term. The case of *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499, went off on the question whether the lease was, in fact, a lease for one year or more than a year. No question of estoppel as a determinative factor seems to have been involved.

In the case before us, while the evidence is conflicting, we believe it sufficiently establishes the fact that the \$2,200 increased rental for the last eight months of the old lease which was then not questioned as a valid lease by either side was in the nature of a bonus or a consideration going to the entire new term and paid as an inducement for that term. It seems clear that the respondent would not have paid that sum but for the fact that he thought he was thereby securing a valid lease for four years additional to the old term. The appellant contends that this sum is insignificant as compared to the whole rental reserved in the new lease for the entire term. While it is small in comparison with the entire rent reserved, we can hardly say that, as a matter of law, \$2,200 is an insignificant sum in any connection when paid as a bonus to induce a contract. As to the payment of \$3,000 for the worthless steel company's stock, the evidence, while raising a suspicion that G. Henry Whitcomb, chief stockholder in the appellant company, knew that Moore was requiring these purchases from tenants in the building, it is not sufficient to establish that knowledge as a fact so as to be invoked as an element of estoppel against the appellant. We think, however, that when David Whitcomb, early in 1913, with full knowledge that the lease was made in the name of the Moore

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Investment Company, with full knowledge that it was unacknowledged and with the knowledge that the respondent claimed a valid lease extending to December 31, 1913, recognized that lease by telling both the respondent and his attorney, when a new lease was sought, that the respondent could remain in possession until December 31, 1913, was a ratification of the written lease within less than a year of its expiration and constituted, in effect, a new lease in writing for less than a year. But, aside from this, the respondent, acting upon the faith of Whitcomb's statement that he might remain in possession until December 31, 1913, invested large sums for the fall trade of that year, thus placing himself, on the faith of Whitcomb's promise, in a position where, if that promise were not kept, he stood to lose a large sum of money. In view of this situation, it would be extremely inequitable to now permit the appellant to assert the invalidity of the lease for the remainder of the term. Upon the whole record, we are unable to say that the court was in error in holding that the appellant was estopped to deny the validity of the lease.

The claim is also made, but not discussed, that the lease was void because in the name of the Moore Investment Company, not the owner of the property nor authorized by the owner to make leases. The evidence fairly established the fact that the Moore Investment Company, or Moore, its manager, had authority to lease the property, and that the form of the lease he would give was left to his discretion. Moore's agency for the appellant in the management of the building at the time the various leases referred to in evidence, including this lease, were executed is, in fact, not seriously disputed. The fact of Moore's agency made it incumbent upon the appellant to explain why the lease was so drawn by its agent. No explanation was offered except the statement of David Whitcomb that when Moore wanted to give a real or valid lease, he made it in the name of the Arcade Company. It is not disputed that the appellant knew that

Moore made leases in both ways. The appellant, with knowledge that the lease ran in the name of the Moore Investment Company, by permitting the respondent to remain in possession for almost the entire term, without questioning the lease as its own, and accepting the benefits of the contract, adopted the lease as its own. *Brown v. Baruch, supra*. In such a case, the statute of frauds is no defense.

"True, power can not be conferred on an agent to execute a deed conveying land, except by a writing of the same dignity; but there is high authority for holding, as we do, that where an agent, though verbally empowered to sell, attempts to convey land by deed, such deed will be treated as a good memorandum or contract, binding the vendor to convey the land. *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963; *Henry v. Root*, 33 N. Y. 526, 550; *Blacknall v. Parish*, 59 N. C. 70, 78 Am. Dec. 239. So, whether or not we regard the deed of lease from Hill to Freeman a good conveyance of the equitable title of Vickers, it is good as a contract of sale by Vickers' agent, under the statute of frauds, for his equitable title, binding him and his grantees, and supporting the decree below, denying relief, and which decree we are of opinion should be affirmed." *Mustard v. Big Creek Development Co.*, 69 W. Va. 713, 72 S. E. 1021.

The same facts which establish the estoppel to deny the lease because not acknowledged operate to defeat the claim that the lease was not the lease of the appellant.

II. We find it unnecessary to enter into a lengthy discussion of the appellant's contention that evidence of estoppel should not have been admitted because estoppel was not specifically pleaded. While the facts going to establish estoppel were not specifically pleaded as estoppels, we think sufficient was alleged to put the appellant upon notice that estoppel would be relied upon. In paragraph 2 of the complaint, it is alleged that the plaintiff has paid the defendant all installments of rent due under the lease, has carried out all covenants on its part to be performed, and, under the lease, has expended several thousand dollars in fitting up the premises for use; and in paragraph 10, the plaintiff al-

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leges that he has spent the sum of \$4,000 in fitting up the storeroom for use as a ladies' cloak and suit store and, on account of advertising done by the plaintiff and the knowledge the public has that he is in business in the leased premises, it is impossible for the plaintiff to remove therefrom to another location without losing many thousands of dollars. Early in the course of the trial, in response to an inquiry by the court and by counsel for appellant, counsel for the respondent stated that the respondent claimed an estoppel to deny the lease. When counsel for the appellant objected to the introduction of any evidence of estoppel, on the ground that estoppel was not pleaded, the court said: "I will hear your testimony and consider the weight of the whole proof that is before the court." To this, counsel for the appellant responded: "Very well, your honor, we desire an exception."

From that time on, respondent's evidence was devoted almost entirely to proof of the facts constituting an estoppel and that of the appellant, to facts going to combat an estoppel. The appellant states that no authority has been cited showing that this court has ever gone to the length of holding that nonconformity of proof to pleadings is not fatal where seasonably objected to, either in a case in equity or at law. In the case of *Sjong v. Occidental Fish Co.*, 78 Wash. 4, 138 Pac. 313, decided since the briefs in this case were written, we said:

"In this court the appellant objects to the ruling of the trial court permitting the respondent to introduce evidence, over its objection, as to acts of negligence not specifically set forth in the complaint. But we think the appellant is not now in a position to successfully urge the objection. Had the court sustained the objection, and were the case here on an appeal by the other side, we would say unhesitatingly that no error had been committed. But a different rule obtains when the trial court treats a defective complaint as sufficient and permits each side to fully present his evidence upon the real issue in the case. In such instances, this court is enjoined by statute to hear such causes upon their merits, disregard all technicalities, and to consider all amendments

which could have been made as made. Rem. & Bal. Code, § 1752 (P. C. 81 § 1255). True, if it appears that the complaining party has been surprised or misled by the want of sufficient allegations in the pleadings, and has thereby been prevented from fully presenting his case to the jury, the error is fatal to the record, but nothing of this sort appears in the present record."

This language is cited with approval in the case of *Carlson v. Druse*, 79 Wash. 542, 140 Pac. 570. See, also, *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 132 Pac. 643. The colloquy between the court and counsel above quoted clearly advised counsel for the appellant that the respondent would rely upon estoppel as establishing a valid lease. No claim was then made of surprise nor any request for a continuance to meet that proof. We can hardly believe that the appellant was prejudiced by the breadth which the court permitted the issues to take in the evidence. Upon the whole record, we are satisfied that substantial justice has been done, and that we would be doing an idle thing to remand this cause in order that the claim of estoppel might be formally pleaded and practically the same evidence produced as that upon which the court has already based his decree.

The judgment is affirmed.

Crow, C. J., MAIN, GOSE, and CHADWICK, JJ., concur.

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[No. 12131. Department One. July 14, 1914.]

THE STATE OF WASHINGTON, *on the Relation of T. W. Long et al., Plaintiff, v. THE SUPERIOR COURT FOR LEWIS COUNTY et al., Respondents.*¹

EMINENT DOMAIN — PARTIES — STATUTORY PROCEEDINGS—LESSEES. In providing the procedure for the exercise of the power of eminent domain, it was competent for the state, by Rem. & Bal. Code, § 921, to require service only upon owners and persons interested in the land "so far as the same can be ascertained from the public records;" especially in view of Id., §§ 929-931 providing a method for determining conflicting interests or claims to the award; hence it is not necessary to bring in as parties defendant, lessees who failed to record their lease.

SAME—PROCEEDINGS—AWARD—APPORTIONMENT—RIGHTS OF LESSEES. In eminent domain proceedings, where the award was for the full value of the land, lessees who failed to record their lease and therefore were not necessary parties, under Rem. & Bal. Code, § 921, have no claim against the petitioner, but must seek their proportion of the award under Id., §§ 929-931.

SAME — AWARD — PARTIES CONCLUDED — LESSEES WITH NOTICE. Where record owners of land defended eminent domain proceedings as holders of the full legal title, lessees who had not recorded their lease, and had not been made parties, are bound by the award, where they had notice of the suit and were present at the trial without asserting any claim or interest in the land.

Application filed in the supreme court July 10, 1914, for a writ of certiorari to review a judgment of the superior court for Lewis county, Rice, J., entered June 30, 1914, pending condemnation of a leasehold. Denied.

Hayden, Langhorne & Metzger and *W. E. Bishop*, for relators.

F. M. Dudley and *Gus L. Thacker*, for respondents.

CHADWICK, J.—To state the facts in this case as they are presented to us by the petition of relators would unneces-

¹Reported in 141 Pac. 906.

sarily extend the limit of this opinion. In order to meet the legal questions suggested by counsel, it is enough to say that the respondent Puget Sound & Willapa Harbor Railway Company, a corporation, brought an action in the superior court of Lewis county seeking to condemn a right of way over lands owned by relators T. W. Long and Mrs. T. W. Long. The proceeding was prosecuted to a final judgment awarding damages in the sum of \$4,750. This amount was paid into the registry of the court and a decree of appropriation taken. It thereupon came to the notice of respondent railway company that the relators T. J. Long and Minnie Long, his wife, claimed an interest in the lands condemned. The respondent railway company filed a petition praying for an order of the court directing the money to be withheld until the relative rights of the owners and the lessees could be adjusted between themselves. The prayer of this petition was granted, and the court further directed that the respective relators should not in any way interfere with the prosecution of the work of the railway company over and across the lands condemned. Upon the petition of the relators, this court issued an order directing the judge of the lower court and the associate respondent to appear and show cause why further proceedings on the part of the railway company should not be stayed pending an orderly condemnation of the leasehold interest. The lessees were in possession of the property but their interest was not disclosed by any public record. No further reference to the facts is necessary.

Among the propositions urged by respondents is that the alleged lease is void, in that it purports to be a demise for a period of three years and is neither witnessed nor acknowledged as required by Rem. & Bal. Code, § 8802 (P. C. 295 § 1). We shall not discuss this question but will go directly to the real merits of the case.

So far as we have been able to make ourselves familiar with the statutes of other states in the time we have given our-

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selves for the preparation of this opinion, the statute of the state of Washington defining a procedure in eminent domain proceedings is *sui generis*. The general rule is that all parties who have an interest in the property should be made parties to the condemnation proceeding, and it is a rule quite as general that a lessee has an estate of which the law will take notice and is entitled to compensation if the reversion is taken in the exercise of the sovereign right of eminent domain. Our statute, which, as we have stated, is neither like the general rule nor the usual statutory provisions covering such cases, provides that a petition in condemnation proceedings shall describe the property with reasonable certainty, and contain "the name of each and every owner, encumbrancer or other person or party interested in the same or any part thereof, so far as the same can be ascertained from the public records." Rem. & Bal. Code, § 921 (P. C. 171 § 173). This statute has never been construed by this court. However, we were called upon to pass upon a similar statute in the case of *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68. We there held the proceeding to be sufficient, it being brought against "the owners and occupants and the persons having an interest therein so far as they were known to the officer signing the petition or as they appeared from the records in the office of the county auditor." We have no doubt of the soundness of our views in that case, for, as was there said, reference to fundamental principles is often times most helpful in the solution of unusual and unique propositions of law. This proceeding is not an admeasurement of private interests. The exercise of the power of eminent domain is the exercise of the sovereign power of the state. Having original power to take without compensation, it is only in virtue of the constitution, art. 1, § 16, that the sovereignty, whether the power is exercised by the state or through the mediumship of its instrumentalities exercising public functions, is bound to make compensation at all. The state may define any procedure that does not violate the con-

stitutional guaranty, and it is well within the power of the state to provide for its own protection that one condemning property in aid of the public functions or service of the state shall not be required to go beyond the public records in determining proper or necessary parties to the proceeding. The state has provided a system of public records, the object and purpose of which is to give the citizen the opportunity and the privilege to publish to the world his interest or claim of interest in property held under the protection of its laws. It can work no hardship if an encumbrancer or a lessee of real property is required to make use of that record under penalty of having his rights foreclosed as against the state or its agents in an action in which the sovereignty of the state is asserted. If this were not the rule, the functions of the state might be delayed or paralyzed at the will of the citizen. One undisclosed interest might follow another, whereas it is the purpose of the law, as defined by the statutes, to convey the whole title unincumbered in one proceeding. To that end, the statute requires encumbrancers and lessees of record to be made parties, and further provides for a method of determining such conflicting interests or claims as may arise after the award has been paid into court. Rem. & Bal. Code, §§ 929, 930, 931 (P. C. 171 §§179, 180, 180a). The purpose of our statute is manifest. We find that purpose nowhere more clearly stated than in the case of *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.*, 209 Mass. 298, 95 N. E. 887:

“First, to have the interdependent rights of all settled at the same time; and secondly, to establish the principle that the amount of damages to be paid where the same land is owned by several persons shall be determined as if it had been owned by one person in fee. . . . In *Edmands v. Boston*, 108 Mass. 535, 544, Wells, J., said: “The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the landowner it is but one estate. The public right is exercised

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upon the land itself, without regard to subdivisions of interest by which the subject is affected through the various contracts of individual owners. The public cannot be expected to forego its right to take property for public uses because the exercise of that right will defeat private contracts; nor is it reasonable that losses arising from the failure of such contracts which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken. Such a rule would seriously impair the public rights. A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interests of their corresponding rights in the fund which has been substituted for the property taken.' In *Burt v. Merchants' Ins. Co.*, 115 Mass. 115, Gray, C. J., said: 'But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole.'

See, also, *Moroney v. State*, 67 Misc. Rep. 58, 124 N. Y. Supp. 824.

In the *Matter of Broadway Surface R. Co.*, 34 Hun 414, the supreme court of the state of New York had occasion to consider chapter 252 of the laws of 1884, § 5. It was there provided that notice should be personally served upon the property owner by delivering the same to him "or his agent or representative, as such owner, agent or representative appears upon such assessment-roll." It was contended that inasmuch as a very considerable portion of the property sought to be taken was held by lessees to whom no notices had been directed, the proceeding must fail. The court said:

"But none of these affidavits show that the names of those tenants appear on the assessment-roll as occupants or owners, nor is their interest in any case shown to be assessed on such roll for the purposes of taxation. . . . The statute does not . . . require that occupants and lessees whose names are not on the assessment-rolls shall be served. They

are regarded by the statute as represented by the persons assessed upon the roll for the full valuation of the property which, of course, includes their interests, and for that reason their interest, in the contemplation of the statute, is represented in and by the assessed ownership."

The text of that case is consistent with the rule announced in 2 Lewis on Eminent Domain (3d ed.), § 719.

The decision in *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853, does not make it clear whether the omitted lien claimants were record parties at the time the proceeding was begun. So far as this case is concerned, it can make no difference whether they were or not. It is enough that this court there declared what is consistent with the general rule, as we understand it to be, as well as sound reason and a proper interpretation of our statute, that, where the judgment is for the full value of the land appropriated, it being taken as unincumbered property, the apportionment of the fund as between rival claimants thereto is a matter of general equity of which the court might take notice and settle without reference to the statute.

Relators plant themselves upon the text of 2 Lewis on Eminent Domain (3d ed.), § 525:

"That life tenants, lessees and reversioners are entitled to compensation has never been doubted, and they must be made parties in order to divest their interests. The duration of the lease is immaterial and parol leases from year to year are as much within the protection of the constitution as longer terms, evidenced by more formal contracts."

The text, while stating a general rule, must not be accepted without such qualifications as are imposed by the statute. This court, in common with others, has declared these proceedings to be *in rem*. *Gasaway v. Seattle*, *supra*. Jurisdiction in such cases does not depend upon the disclosed identity of parties defendant, but upon the subject-matter and an opportunity to be heard in the exercise of the court's due process upon the most effective notice possible to be given.

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"The state has power to thus provide for an adjudication of adverse rights or claims of persons in or to real estate situate within its borders, even though such claimants may be unknown and are without the jurisdiction of the court. Titles to real estate should not be subjected to continuous clouds. A state is under no compulsion to suffer titles to real estate situated within its borders to remain clouded for an indefinite period for the want of a proper method of serving process upon unknown claimants, or a proper procedure to quiet the same." *Phillips v. Thompson*, 73 Wash. 78, 131 Pac. 461.

Our statute provides that the proceeding shall run against the record owners; other statutes provide that it shall run against the owners if they be known, or if not known, that a showing of diligence be made; others, that the proceeding shall be prosecuted as an ordinary civil action. From an inspection of the statutes of many of the states, we are satisfied that the object of the law is to save to the owner and those interested the full cash value of the property taken; and of our own statute, to provide for the taking of the property without reference to the conflicting interests of the several claimants. This holding does not deny the owner of a leasehold the right of compensation, nor does it deny the doctrine of the case of *Gluck v. Mayor etc. of Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. 515, which is confidently relied on. Rem. & Bal. Code, §§ 929-931, protect the interests of a lessee in every practicable way. When, therefore, a lessee has not made his interest to appear of record, and the court has made an assessment in gross, the claim of the lessee is not against the petitioner but against the fund. He may appear in the original proceeding; he may ask an apportionment of the award under §§ 929-931; he may proceed in equity independent of the statute (*Harris v. Howes*, 75 Me. 436); or by way of an action for money had and received. 2 Lewis, Eminent Domain (3d ed.), § 719. The lessees have not seen fit to pursue any of these remedies. Inasmuch as they might have done so, and inasmuch as the petitioner might, had it known of their interest, have made them parties, it

follows that, having present notice of their interest, it may compel them to come in and take their apportionment of the gross award, under § 980 of the Code. Procedure in eminent domain is statutory. When the petitioner has followed the statute, it has discharged its duty to the landowner, and it is not bound to answer in an action at law or in equity to any one claiming a misdirection or illegal apportionment or award of the fund paid into the court. It is not responsible for the delinquencies of the parties claimant, nor is it answerable except upon appeal for the errors or omissions of the court. *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111; *Carton v. Seattle*, 74 Wash. 375, 133 Pac. 596; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109.

The case of *Little Rock & Ft. Scott R. Co. v. Allister*, 62 Ark. 1, 34 S. W. 82, is cited as holding contrary to this doctrine. That case can have no bearing under our statute. The statute of Arkansas makes an eminent domain proceeding obedient to the rules of pleading and practice prescribed for the government of proceedings in the circuit court. The case, if otherwise sound, can be sustained because under such a statute all parties in interest must be made parties, and for the further reason that no provision is made for the apportionment of a gross award.

We think it is clear, under the legal principles applicable to the facts as stated, that the lessees have no present claim against the petitioner. But if it is still contended that they are not foreclosed or that they are not bound to take an apportionment of the present award, we think that it cannot be successfully asserted that the lessees in the instant case could, in any event, compel the petitioner to institute a proceeding against them. The record owners appeared and defended as the owners of the full fee simple title. It is asserted, and is not denied, that the relator lessees were present in the court room and had knowledge and notice of the proceeding. They knew the statute law of the state. The object of the law is to

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give notice to those having a disclosed interest. It does not deny the right of those having an undisclosed interest to be heard at any stage of the proceeding. The object of notice is notice, and the relator lessees could have had no more notice and it would have been no more incumbent upon them to assert their interest in the original proceeding or under the statutory provision for the apportionment of the award had they been made parties to the action and been served with a formal written notice of the hearing. If the present petition sounds in equity, the relators do not come with clean hands. If their right is a legal right, it is measured and amply protected by the statutes which we have referred to and discussed.

The motion to quash filed on behalf of the respondent judge of the superior court, and the demurrer filed on behalf of the Puget Sound & Willapa Harbor Railway Company, are severally granted and an order will be entered denying the prayer of the relators' petition and dismissing this proceeding.

Crow, C. J., MAIN, and ELLIS, JJ., concur.

[No. 11722. *En Banc*. July 14, 1914.]ISAAC A. HILLESTAD *et al.*, Respondents, v. INDUSTRIAL INSURANCE COMMISSION, Appellant.¹

MASTER AND SERVANT—RELATION—WORKMEN'S COMPENSATION ACT—"WORKMAN." The relation of master and servant does not exist between father and son, within the meaning of the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-3, defining a "workman" as every person engaged in the employment of an employer carrying on specified industries, and Id., § 6604-4 providing that in computing the payroll, there shall be included the entire compensation of every workman, whether payable in the form of salary, wage, piece work, . . . money, board or otherwise," where it appears that a son, thirteen years of age, who desired to go to work in his father's shingle mill as a packer, was allowed to go to work driving shingle bolts on a creek on the promise that later he could have the packer's job, there being nothing said about compensation; since, in the case of father and minor child, there must be clear proof of a contractual relation.

SAME—RELATION—LAWFUL EMPLOYMENT—WORKMEN'S COMPENSATION. To obtain compensation under Rem. & Bal. Code, § 6570 of the workmen's compensation act, prohibiting the employment of persons under fourteen years of age, without permission of the superior court, it is incumbent upon the claimant to show that a child under fourteen years of age was employed lawfully; and, in the absence of proof of permission, violation of the law will be presumed.

SAME—RELATION—EMPLOYMENT—WORKMEN'S COMPENSATION ACT. Under Rem. & Bal. Code, § 6570, providing that no person under fourteen years of age shall be "hired" out to labor in any factory, mill, workshop, or store," the statute is violated and no recovery can be had under the workmen's compensation act, where a boy of thirteen was drowned in a creek about eighty rods from a shingle mill, while engaged in driving shingle bolts to the mill; since the creek was in a sense a part of the machinery of the mill, as a conveyor, and the boy was engaged "in the mill" to the same extent that he would have been if putting bolts on the slip of the mill.

GOSE, PARKER, and ELLIS, JJ., dissent.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered September 22, 1913, upon the verdict of a jury rendered in favor of the plaintiffs, in

¹Reported in 141 Pac. 913.

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an action for the death of a son, on appeal from a ruling of the industrial insurance commission. Reversed.

The Attorney General and John M. Wilson, Assistant, for appellant.

Walter B. Whitcomb, for respondents.

CHADWICK, J.—Respondents owned and operated a shingle mill in Whatcom county, to which they brought shingle bolts by floating them down a creek on which the mill was situated. The deceased minor son of respondents lost his life about eighty rods from the mill while engaged as a workman in their business. The situation and condition attending the employment and the accident are fairly shown by the testimony of Isaac A. Hillestad:

“Q. Did you have any conversation with Arthur? A. We had several conversations. He wanted to go up there to go to work, and I would not take him out of school. He wanted to go up as soon as I bought the mill and I would not take him out of school. I told him to stay in school until we moved up. Q. When you moved up what took place? A. He wanted to pack, that is what he really came up for, but I had a packer, and so we had some bolts to drive on the creek, and I told him he could go drive them up until that packer got through and then he could take the packing job. Q. Was there anything said about his compensation for any of this? A. No, sir, there was nothing mentioned about that; in fact he did not know much about the compensation. Q. I mean, was anything said about the wages? A. I don't know there was anything in particular. There was a scale of wages around shingle mills that we pay. They know what the wages are. Q. Was there any understanding of any kind between you and him in regard to that subject? A. Why, he was to get his money the same as the rest of them; that was the understanding. If he stayed in Bellingham he wanted to work in the cannery some place in vacation, and I told him if he wanted to work he might as well come up there and work. Q. Did he go to work? A. Yes, he went to work. Q. Do you know what day he went to work? A. I think he went to work on the creek on Saturday and he worked either all of

Saturday or a part of Saturday. Q. What was he doing on the creek? A. He was driving bolts, gathering up some scattering bolts along the creek. Q. How far was this from the mill? A. I guess it was about eighty rods from the mill where it happened."

At the time of the accident, the son was under the age of fourteen years. A claim was filed with the industrial insurance commission and was by it rejected, upon two grounds: First, that no contract of employment had been shown; and second, that the boy was working in the mill in violation of the provisions of Rem. & Bal. Code, § 6570 (P. C. 291 § 151). An appeal was taken to the superior court where the case was tried by the court with a jury, and a verdict was returned in favor of the respondents. The case is brought to this court by the industrial insurance commission for review.

It is contended by the *Attorney General* that the trial court erred in refusing to take the case from the jury, and decide, as a matter of law, that the evidence was insufficient to support a recovery by the respondents. He contends that, although a child may be emancipated and may contract in his own right with a father, notwithstanding, the law is that the proof of such unusual employment must be clear and convincing.

We think there can be no doubt of this premise, but the principles of the common law can be of little assistance to us in measuring the right of a workman to claim compensation under the industrial insurance law. It is the purpose of that law to compel the industries of the state to bear the burden of accidents occurring in their operation, and being in derogation of the common law, it cannot be construed so as to include those who do not, by words or necessary implication, come within its terms.

A workman is defined to be "every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries

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scheduled or classified in section 4." Laws 1911, p. 346, § 3 (§ Rem. & Bal. Code, § 6604-3).

The law in its tenor and terms contemplates that the relation between employer and employee shall possess some element of certainty. It implies, if indeed it does not literally provide, that there shall be an actual contractual relation between the parties—that is, an agreement to labor for an agreed wage or compensation. The tax put upon an industry is determined by the pay roll. In section 4 of the act it is provided:

"In computing the pay-roll the entire compensation received by every workman employed in extrahazardous employment shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance in the way of profit-sharing, premium or otherwise, and whether payable in money, board, or otherwise." (§ Rem. & Bal. Code, § 6604-4).

We cannot make ourselves believe that there was ever any idea of a contract between the father and the son in this case. We have here a thirteen year old boy. He was anxious to work, as many boys of that age may be. The father admits that there was nothing said about compensation. "In fact, he (the boy) did not know much about compensation." The fact that there was a scale of wages around shingle mills and "they know what the wages are," is no proof that even a father would impliedly agree to pay a thirteen year old boy the full wages of a man, granting that the boy knew the scale and expected that wage. If the son had been a stranger and the question of contract, express or implied, had been raised, respondents might contend, and successfully so, that the contract of employment was wanting in some of its essential elements.

Aside from this, granting the full force of the contention made by respondents, it may well be doubted whether he had begun his work under the contract. He was to take a packer's job and that was not open to him at the time. If the

father, as he had a right to do, directed his child to go out and perform some active labor pending the time when his employment would begin, and which was consistent with the usual direction of a father to a son, it should not be held that the case falls under a special statute designed for a special purpose. Or, to state the proposition in another way, had the son been injured and brought an action against his father and the father was bound to pay under the terms of the compensation law, rather than under the principles of the common law, he could successfully defend the case and rest upon his common law right to direct the labors and energies of his child. The view point of the respondents is not a necessary implication of a statute hostile to the common law, and under well settled rules of statutory construction, cannot be held to be controlling.

If a father is going to insist that the child is a workman, he should be bound by the same rule that the law puts upon one who is of full age, and in the absence of clear proof of a contractual relation, we are disposed to hold that a father who puts his child to work at a hazardous employment assumes the risk attending such employment. This argument is met by counsel for respondent, who says that such a holding would deny a father, the owner of a business or a factory, the right to depend upon the labor of his sons. That case is not before us. We are not holding that a son cannot contract with his father, or be a workman under the compensation law. We are going no further than to hold that, under the facts in this case, the boy was not a workman within the meaning of the law.

The judgment of the lower court must be reversed for another reason. Granting there was a contract, the boy was employed in violation of Rem. & Bal. Code, § 6570 (P. C. 291 § 151), which is as follows:

"No person under the age of nineteen years shall be employed as a public messenger by any person, telegraph com-

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pany, telephone company, or messenger company in any city of the first class in this state, nor shall any child of either sex under the age of fourteen years be hired out to labor in any factory, mill, workshop or store at any time."

Murphy v. Bennett, 11 App. Div. 298, 42 N. Y. Supp. 61, is relied on by respondents. In that case it was held that a boy who was engaged in taking lumber from a pile, the lumber to be carried to and manufactured in an adjacent mill or factory, was not employed in a manufacturing establishment. This case is cited, but not discussed, in *Labatt on Master and Servant*, §§ 5048, 5924, and 5929, and 22 Cyc. 526. It is the judgment of the writer of this opinion that the case is not sound and should not be followed. If we were to do so, we would violate the spirit and purpose of the child labor law. The reasoning which would sustain a holding that a child who takes a board off of a pile and carries it to the door of the mill, there to be manufactured, is not engaged in the mill, and the boy who receives it at the door to be carried to the planer, is engaged in the mill, is altogether too refined, when we take into consideration the objects, purposes and humane spirit of the law. The object of the law is three-fold: to prevent persons of immature judgment from engaging in hazardous occupations; to prevent employment and overwork of children during the period of their mental and physical development; and to prevent, so far as the law is able to prevent it, a competition between weak and under-paid labor and mature men who owe to society the obligations and duties of citizenship. The New York case is not in accord with the spirit of the case of *Wendt v. Industrial Insurance Commission*, ante p. 111, 141 Pac. 311. The case is so recent that it must be familiar and we will not restate the facts. It is there said:

"If the employer conducts any department of his business, whether large or small, as an extra hazardous business within the meaning and defined terms of this [industrial insurance

law] act, his workmen would come within the class designated by the act, and be entitled to the protection of the act."

Floating bolts to the mill is a department or a part of the manufacturing of shingles.

In the case of *Casey v. Barber Asphalt Pav. Co.*, 202 Fed. 1, the district court held that a paving plant erected and operated on a car and moved from place to place was not a "factory, or work-shop and was to be likened to a threshing machine, a steam shovel, a wrecking car, and other similar machines and appliances, and to the small concrete and asphalt mixers which are frequently seen in use upon the streets of cities and towns." The circuit court of appeals said that it did not understand that a house is an absolutely essential element of either factory or mill. While the soundness of the circuit court's judgment in that case may be doubted, yet its reasoning seems to us to be applicable to the case at bar. Moreover, our statute is, as was the New York statute, very much broader in its concept than the usual definition of a mill, workshop or factory. Ordinarily, a mill or factory includes buildings or premises within a certain close where mechanical power is used to work and move machinery. Black's Law Dictionary, Title, "Factory" and the factory acts in many of the states have so defined mills and factories. They are so defined in §§ 2 and 3 of the industrial insurance law. The New York case was evidently decided with this definition in mind, whereas, our child labor law makes no such limitation, but adopts a definition as broad as the spirit of the act.

Counsel for respondents is of the opinion that this defense is not available to the appellant for the reason that the record is silent as to whether the superior judge had given permission to the minor to work in the mill. To effectuate the intention and purposes of § 6570, it is necessary that we hold that one who employs a child under the age of fourteen years should be prepared in all cases to show that the child is employed lawfully. In the absence of such showing, the law

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will presume that the employment is in violation of a prohibitory statute. The fact that the boy was engaged at a place eighty rods from the mill would not change the rule. The stream was, in a sense, a part of the machinery of the mill, just as much as a conveyor or elevator would have been, and it cannot make any more difference whether the boy was drowned while moving bolts eighty rods away than it would if he were moving them eight rods away, or was about to put them on the slip of the mill.

It is contended by respondents that this rule can have no application in this case for the reason that there is no causative connection between the violation of the law and the death of the boy, under the authority of the following cases: *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 49 Am. St. 467; *Conboy v. Railway Officials etc. Ass'n*, 17 Ind. App. 62, 60 Am. St. 154. In the *Bloom* case, it was said:

"There must in all cases, whether the law violated be a criminal one or a civil one, be some causative connection between the act which constituted the violation of the law and the death of the assured. A man engaged in uttering counterfeit money might meet his death while so engaged, and yet there might be circumstances which would destroy the causal connection between the death and the violation of the law, and in such a case it is clear that a company would not be relieved from liability."

That rule would apply if this action were a common law action and brought by the father of the boy against a third person. It has no application in a case brought against the industrial insurance commission to compel a payment out of the accident fund. The industrial insurance commission owes no primary duty to an employee or a workman in any industry. It is not answerable as for negligence. Had the boy been injured, granting his emancipation, he might have sued his father and recovered under the rule invoked; but here the father is suing the state and asking payment out of

a fund contributed by the industries of the state and is pleading his own negligence. The burden of meeting the consequences of the injury to workmen is put upon the industry, but the state has not assumed a statutory duty to reimburse the father for the loss of the services of the son who has been employed by him in violation of a positive and equally meritorious statute.

For these reasons, the judgment of the superior court is reversed, and the action is remanded with instructions to dismiss.

CROW, C. J., FULLERTON, MORRIS, MOUNT, and MAIN, JJ., concur.

GOSE, J. (dissenting).—A minor son of the respondents fell from a raft and was drowned while engaged in collecting shingle bolts for them. He was working about eighty rods from the mill at the time he was drowned. Section 3 of the industrial insurance act provides:

“Workman means every person in this state, who after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant or, he being in the course of his employment, away from the plant of his employer.” § Rem. & Bal. Code, § 6604-3.

The purpose of the law is to guarantee protection to those working in the industries covered by the act. I think the words “engaged in the employment of an employer,” mean those in the service of an employer carrying on or conducting any of the industries embraced in the act. I cannot agree with the majority opinion that the term implies that there shall be an actual contract relation between the parties. That construction is not in accord with the humane purpose of the law, and to my mind is an unsound interpretation of the statute. Nor is it important that the boy had not actually commenced work as a packer. He was engaged in the service of an employer who was conducting an industry em-

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braced within the act. In other words, he was working for him "away from the plant." Whether he did or did not receive a salary is, to my mind, beside the question.

Nor am I able to comprehend how he was "hired out to labor in any factory, mill, workshop, or store." He was not working there at the time he met his death, but eighty rods distant, upon a raft in a stream, gathering shingle bolts which had been stranded, for the purpose of causing them to float to the mill. The fact that he was intending to work as a packer in the mill at some subsequent time, however soon, does not bring him within the prohibition of the statute. Considering the humane purpose of the law, it seems to me that he was a workman within its meaning, and that he was not working in a factory, mill, or workshop. I therefore dissent.

PARKER and ELLIS, JJ., concur with GOSE, J.

[No. 11429. Department One. July 15, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v. CHICAGO,
MILWAUKEE & PUGET SOUND RAILWAY COMPANY,
Respondent.¹

MASTER AND SERVANT—WORKMEN'S COMPENSATION—PREMIUMS PAYABLE TO STATE—CLASSIFICATION—RATE—STATUTES—CONSTRUCTION. Under 3 Rem. & Bal. Code, § 6604-4, of the workmen's compensation act, classifying "construction work" and requiring payment into the state treasury of a premium of six and one-half per cent of the payroll for construction work on "tunnels," with various other rates for "bridges," "carpenter work," etc. and five per cent for "steam railroads," and Id., § 6604-4, subd. 3, providing that if a single establishment of work comprises several occupations listed in different risks, the premium shall be computed according to the payroll of each occupation, if clearly separable, a railroad engaged in the construction of a tunnel for use on its main line must pay the premium listed for "tunnel" construction, where the payroll therefor was clearly separable from its payrolls for other construction work (CHADWICK, J., dissenting).

¹Reported in 141 Pac. 897.

Appeal from a judgment of the superior court for King county, Humphries, J., entered May 28, 1913, upon findings in favor of the defendant, dismissing an action for premiums due under the industrial insurance law, after a trial to the court. Reversed.

The Attorney General and *S. H. Kelleran, Assistant*, for appellant.

F. M. Dudley, for respondent.

MAIN, J.—This action arises under the workmen's compensation act, chapter 74, laws of 1911, p. 345 (3 Rem. & Bal. Code, § 6604-1 *et seq.*). It presents the question of the proper classification of the work done in the construction of a tunnel through the Cascade mountains, commonly known as the Rockdale tunnel.

The plaintiff, by its industrial insurance department, had classified the work as tunnel construction, upon which a contribution was demanded at the rate of six and one-half per cent. The defendant insisted that the work should be classified as steam railroad construction work, upon which a contribution at the rate of five per cent was required. The cause was tried to the court without a jury. So far as necessary to set them forth, the facts found by the trial judge were as follows:

"That in or about the month of April, 1912, the defendant commenced the construction of, and at all times since has been engaged in the construction of a tunnel through the Cascade Mountains, from a point near Rockdale in King county, a station on the main line of the defendant railway, to a point near Keechelus, in Kittitas county, another station on said main line of railway; that the sole purpose for which defendant is constructing said tunnel is to lay, maintain and operate therein and through the same a steam railroad to be used by said defendant as a portion of its main line of steam railroad, extending from the waters of Puget Sound to the town of Mobridge in South Dakota; that the construction of said tunnel for the purpose of operating its main line of rail-

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way through the same, was a part of the original plan of said defendant company for the construction of the main line of said railway from Mobridge, South Dakota, to the waters of Puget Sound, and that it has at all times been the purpose and intention of said railway company to construct such tunnel and to operate its trains through the same as a part of its main line of railway; that in order to secure as speedy connection as possible between that portion of said main line of railway west of the Cascade Mountains, and that portion to the east thereof, and to the end that such railway might be operated without awaiting the completion of such tunnel, the said railway constructed a railway track connecting the portions of its said main line of railway east and west of said Cascade Mountains respectively; that such connecting track has been constructed, and has been in operation, together with the portions of said main line east and west of the Cascade Mountains respectively, and thus forming a continuous line from the waters of Puget Sound to the town of Mobridge, South Dakota, for about two years; that said track so constructed and now in operation between Rockdale and Keechelus, crosses over the Cascade Mountains through the Snoqualmie Pass; and that said line is now, and has been, since its construction about two years ago, as aforesaid, operated over and through said pass by the defendant for freight and passenger purposes, and will continue to be so operated for such purposes until the completion of said tunnel; that upon such completion, the line over the Pass from Rockdale to Keechelus, will be abandoned and the main line of the defendant railway will be maintained and operated through the said tunnel; that the estimated cost of the construction of said tunnel is approximately two million five hundred thousand (\$2,500,000.00) dollars, and that the estimated time before the completion thereof, is approximately three (3) years.

“That the actual payroll of the workmen employed by the said defendant in and about its said work of tunnel construction, in the extra hazardous employments and departments thereof, for the months of April, May, June, July, 1912, was and is the sum of \$24,682.22; that the industrial insurance department of the state of Washington has assessed against the defendant a premium or contribution of six and one-half per cent of said sum, and has made call for premiums or con-

tributions for the said months above mentioned, and has demanded the payment of said six and one-half per cent upon said amount, being the sum of \$1,604.33, from the defendant; that the defendant has paid five per cent upon said actual payroll, amounting to \$1,244.10, and has refused to pay the additional one and one-half per cent, amounting to \$370.23, which latter sum is the amount in controversy in this action;"

No question is raised as to the correctness of these findings. Judgment was entered dismissing the action, from which the appeal is prosecuted. The sole question to be determined is, whether the work in question should be classified under the workmen's compensation act as tunnel construction or steam railroad construction. If the latter is the proper classification, then the judgment should be affirmed; otherwise, it should be reversed.

The provisions of the law which call for construction are certain portions of 3 Rem. & Bal. Code, § 6604-4. This section is both extensive and comprehensive, and for the purpose of convenient reference, the particular portions involved will be referred to as subdivisions 1, 2, and 3, and are here set forth as such. Subdivision 1 provides that employers engaged in extra hazardous industries shall pay into the state treasury a sum equal to a percentage of the pay roll in accordance with the following schedule:

CONSTRUCTION WORK.

Tunnels; bridges; trestles; subaqueous works; ditches and canals (other than irrigation without blasting); dock excavation; fire-escapes; sewers; house moving; house wrecking065
Iron, or steel frame structures or parts of structures.....	.080
Electric light or power plants or systems; telegraph or telephone systems; pile-driving; steam railroads.....	.050
Steeple, towers or grain elevators, not metal framed; dry docks without excavation; jetties; breakwaters; chimneys; marine railways; waterworks or systems; electric railways with rock work or blasting; blasting; erecting fireproof doors or shutters.....	.050

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Steam heating plants; tanks, water-towers or windmills, not metal frames040
Shaft sinking060
Concrete buildings; freight or passenger elevators; fireproofing of buildings; galvanized iron or tin works; gasworks, or systems; marble, stone or brick work; road-making with blasting; roof work; safe moving; slate work; outside plumbing work; metal smokestacks or chimneys.....	.050
Excavations not otherwise specified; blast furnaces.....	.040
Street or other grading; cable or electric street railways without blasting; advertising signs; ornamental metal work in buildings035
Ship or boat building or wrecking with scaffolds; floating docks045
Carpenter work not otherwise specified.....	.035
* * * * *	
Road-making020

Subdivision 2 classifies the industries for the purpose of making such payment and the making good of any deficit. In other words, this classification requires each class to respond to the demands upon it without claiming contribution from any other class. It is as follows:

CONSTRUCTION WORK.

Class 1. Tunnels; sewer; shaft sinking; drilling wells.

Class 2. Bridges; mill wrighting; trestles; steeples, towers or grain elevators not metal framed; tanks, water towers, windmills not metal framed.

Class 3. Subaqueous works; canal other than irrigation or docks with or without blasting; pile-driving; jetties; breakwaters; marine railways.

Class 4. House moving; house wrecking; safe moving.

Class 5. Iron or steel frame structures or parts of structures; . . . carpenter work not otherwise specified; marble, stone or tile setting; mantel setting; metal ceiling work; painting of buildings or structures; concrete laying in floors or foundations; . . .

Class 6. Electric light and power plants or system; telegraph or telephone systems; cable or electric railways with or without rock work or blasting; waterworks or systems; . . .

Class 7. Steam railroads; logging railroads.

Class 8. Road making; street or other grading; concrete laying in street paving; asphalt laying. . . ."

Subdivision 3 provides:

If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be

computed according to the pay-roll of each occupation if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards.

It will be noted that tunnel work in subdivision 1 is given a classification carrying a rate of six and one-half per cent, while railroad construction work carries a rate of five per cent. Railroad construction work may, and at times does, require tunnel construction.

In subdivision 2, that being the classification for making payment and making good any deficit, it likewise appears that tunnel construction and railroad construction are not in the same classification. It is well known that, in railroad construction, there are involved a number of occupations which are scheduled in different risk classes, some of which take a rate greater than railroad construction and some less. Practically the same situation exists as to electric railways and road work, as well as other enterprises that might be mentioned. The question is whether, when the occupations included in railroad construction are listed in different risk classes, and railroad construction itself is given a risk classification, each occupation shall carry its specific rate or the rate for railroad construction shall include all. The answer to this question is found in subdivision 3. It is there provided that if a single establishment or work comprises several occupations listed in different risk classes, the premium shall be computed according to the pay roll of each occupation if clearly separable. In this case, the pay roll for the tunnel construction was so separable. The trial court found not only the actual pay roll for workmen employed in the tunnel, but that the railroad other than the tunnel had been previously constructed and was in operation. If the operations involved in the construction are so interrelated as not to be clearly separable, then the enterprise classification would prevail. In other words, when the various occupations are separable, each occupation takes the rate of its particular class. But where they are not separable, the equalized classification

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for the enterprise fixed by the statute controls. When the occupations are so interrelated as not to be separable and the enterprise which comprises several occupations is not given a separate risk class, an average rate of premium shall be charged for the entire establishment, as provided in the last clause of subdivision 3. This seems a reasonable construction of the statute and gives effect to all of its provisions. To hold that, since railroad construction work is given a separate classification, all occupations included therein takes the railroad classification rate, would in effect destroy the classification of tunnel construction. Practically all of the enterprises in connection with which tunnels would be constructed take a separate risk classification.

The judgment will be reversed, and the cause remanded with direction to enter judgment as prayed for in the complaint.

CROW, C. J., ELLIS, and GOSE, JJ., concur.

CHADWICK, J. (dissenting)—It seems to me that the judges are clearly wrong. Inasmuch as the statute, under the title "Construction Work," covers "tunnels, bridges, trestles, . . . pile driving, . . . blasting," at .065, and ". . . grading, carpenter work . . ." at .035, which terms, it will be admitted, cover every detail of railroad construction, the question naturally arises, Why were the terms, "construction work, . . . steam railroads, .050," used at all? The words either mean what they import—construction of steam railroads—or they mean nothing. The majority opinion writes them out of the statute, for it has held that the general term "steam railroads," must give way to the particular terms, "tunnels, trestles, carpenter work, etc."

It is fundamental that, in the construction of statutes, courts must give effect to every word if possible. Following this rule, it is obvious that the legislature intended to strike an average, between tunnels, bridges, trestles and blasting, at .065, and grading and carpenter work at .035, inasmuch

as they are all the descriptive terms applicable to railroad construction, and fix the rate for the construction of steam railroads at .050, or one-half the sum of .065 and .035. This construction gives effect to the whole statute, whereas the majority opinion kills a part of it; for, if it be the law that the schedule can apply to nothing but a particular detail, and instead of one rate covering all items of railroad construction to be included in one account with the commission, there would be as many rates and as many accounts as there are kinds of work. The fact that the words, "construction . . . steam railroads," were used, indicates, in a most conclusive way, the intent of the legislature to make one rate and one account, and we should not ignore it.

I dissent.

[No. 11337. *En Banc*. July 17, 1914.]

AUGUSTA HAGEMAN, *Appellant*, v. PUGET SOUND ELECTRIC
RAILWAY, *Respondent*.¹

CARRIERS — PASSENGERS — FREE PASSES — EMPLOYEES — CONTRACT RIGHTS. An employee riding on a free pass given as part of the consideration for her services, is a passenger for hire, and a clause exempting the carrier from liability for negligence is void as against public policy; while it would not be so if the pass were a pure gratuity.

SAME—FREE PASSES—WAIVER OF CONTRACT RIGHTS. An employee contracting for a free pass whenever desired, as part of the consideration for her services, whereby she would become a passenger for hire, may waive her contract rights, and does so, where, after the employment, her written application therefor and the pass both stipulated that the pass was a pure gratuity without any consideration (MAIN, GOSE, and ELLIS, JJ., dissenting).

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 10, 1913, dismissing an action for personal injuries, upon sustaining a demurrer to the complaint. Affirmed.

¹Reported in 141 Pac. 1027.

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Opinion Per MOUNT, J.

Gordon & Easterday, for appellant.*J. A. Shackleford and F. D. Oakley*, for respondent.

MOUNT, J.—The trial court sustained a demurrer to the plaintiff's complaint in this action. The plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed. This appeal is prosecuted from that judgment.

The complaint is for damages for personal injuries which occurred to the plaintiff while she was riding upon the defendant's train between Tacoma and Seattle. The complaint alleges that the plaintiff was in the employ of the defendant from the year 1907 to the time of her injuries. Paragraph four of the complaint is as follows:

"That, in the year 1907, and thereafter until the happening of the injury to the plaintiff hereinafter mentioned, the custom and practice existed between both of said corporations of granting so called free tickets or passes over their respective lines to the clerks and employees so engaged in working in said offices, upon their request therefor. That said so called free tickets or free passes issued by the defendant corporation, in pursuance of said general custom and practice, were all similar in form and contained alike the following printed stipulation designated 'Conditions,' namely:

"The person accepting this free ticket assumes all the risks of accident and expressly agrees, understands and acknowledges that this ticket is delivered to him or her as a pure gratuity and for no consideration whatsoever, and further expressly agrees that the company shall not be liable under any circumstances whether by negligence of its agents or otherwise, for injury to the person or for the loss of or injury to the property of the person using this ticket, and in no event will said person consider the company a common carrier or liable as such.

"This pass is not transferable and it will not be honored unless signed in ink and presented by the person for whom issued.

"I accept the above conditions."

"And the custom and practice of the defendant corporation existing and obtaining in reference to the issuance of such ticket or pass, was for the clerk or other employee applying therefor, to sign a printed request in substantially the following form:

"Tacoma, Wn. (Date)

"To the Puget Sound Electric Railway,

"Gentlemen: I hereby request that you deliver to me a pass whereby I will be enabled to travel on your cars without the payment of fare.

"I expressly agree, understand and acknowledge that the delivery of such a pass to me is and will be a pure gratuity on your part, and supported by no consideration whatever, and that in accepting said pass I assume the risk of every injury to person or property sustained by me, howsoever caused, while riding upon cars controlled, owned or operated by you.

Yours very truly,'"

Paragraph seven of the complaint is as follows:

"That, at the time the plaintiff entered into the employ of said defendant corporation and the said Tacoma Railway & Power Company, as set forth in paragraph V hereof, the custom and practice of issuing said so called free tickets or free passes hereinbefore mentioned, was called to her attention and she was informed that if she accepted said employment she would be entitled to avail herself of such custom and practice, and would be entitled to transportation over defendant's line without other consideration than her services. But plaintiff was not at that time, nor prior to the time of her entering into said service, informed that the transportation to be thereafter issued to her would contain a stipulation exempting defendant from liability in case of accident or injury to her resulting from the negligence of said company, its agents, or servants; and plaintiff was not at that time, nor at any time prior to entering said service, informed that any conditions limiting liability attached to such transportation; and plaintiff was not at that time, nor at any time prior to entering said service informed that in order to secure transportation she would be required to execute a request substantially in the form set out in paragraph IV hereof, and exempting the defendant from liability for its negligence. And plaintiff alleges that the promise and

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representation that if she accepted employment with the defendant she would be entitled to transportation over its lines upon request, without other consideration than her services, became and was a material part of the inducement for the entering into the contract of employment, and said representation and inducement became and were the representation and inducement of the defendant company to this plaintiff."

Paragraph eight is as follows:

"That thereafter, to wit, on or about the 26th day of November, 1910, and while plaintiff was in the employment of said defendant as hereinabove stated, plaintiff requested from the defendant transportation over the lines of said defendant company from said city of Tacoma to the said city of Seattle in King county, and thereupon, solely at the request and direction of the defendant, signed a printed form substantially in the language of the form set forth in paragraph IV of this complaint, and received from the defendant a so called pass or ticket in form substantially as that also set forth in paragraph IV hereof.

"Plaintiff alleges that notwithstanding the language of said request and application so made and signed by her, and notwithstanding the language and the so called conditions specified in the so called free ticket or pass so furnished to her by said defendant, said ticket and pass was so issued and delivered to her in virtue of her employment as hereinbefore stated and constituted a portion of the consideration for her services so rendered to the defendant company in virtue of her employment as hereinbefore stated."

The rest of the complaint has reference to the negligence of the company and the injury she received.

The question presented upon this appeal is whether, under the allegations of the complaint, the plaintiff was a passenger for hire, or was a gratuitous passenger.

In *Harris v. Puget Sound Elec. R.*, 52 Wash. 289, 100 Pac. 838, we quoted from the note found on page 557, 4 Am. & Eng. Ann. Cases, as follows:

"The decisions are not in harmony as to the effect to be given to a provision in a free pass exempting the carrier from liability for injuries caused by its negligence or that of

its servants. According to one view, such an exemption is contrary to public policy and not enforceable.'

"As sustaining this view a number of cases are cited, among them *Mobile & Ohio R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 346; *Jacobus v. St. Paul etc. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360, and other cases. The note then continues:

"'In other jurisdictions the view is taken that there is no violation of law or public policy by an agreement on the part of the pass holder that the carrier shall not be liable for injuries caused to him by its negligence or that of its servants.'

"In support of this rule are cited a number of cases, among which are *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 24 Sup. Ct. 515, 48 L. Ed. 742; *Payne v. Terre Haute R. Co.*, 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491, and other cases. This court in *Muldoon v. Seattle City R. Co.*, 7 Wash. 528, 35 Pac. 422, 38 Am. St. 901, 22 L. R. A. 794, and 10 Wash. 311, 38 Pac. 955, 45 Am. St. 787, held to the last-named rule, where the pass was a mere gratuity. But in *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586, at page 645, we said:

"'But we expressly hold that if the respondent's transportation constituted a portion of the consideration for his services, he became a passenger for hire, just the same as anybody else who parts with anything of value for transportation.'

It is plain, from the decision in the *Harris* case and from the cases therein cited, that this court has adopted the rule that where the transportation is a mere gratuity, the carrier is not responsible for injuries sustained by such passenger. But if the person injured is a passenger for hire, then the railway company is liable.

The complaint in this case alleges that, at the time the appellant was employed by the respondent, she was promised transportation as a part of the consideration for her services, and at that time she was not informed that it

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would be necessary for her to enter into an agreement waiving damages if transportation were issued to her. But the complaint shows that later, when she applied for the transportation upon which she was riding when she was injured, she was informed that it would be necessary for her to sign such a stipulation. It is conceded in the complaint that she did sign the stipulation and agreed that the delivery of such pass to her would be a "pure gratuity on your part and supported by no consideration whatever," and that in accepting such pass she assumed the risk of injury to her person or property while riding upon the cars. And upon this express condition, the pass was issued.

If the employment was upon the terms as alleged in the complaint, it is plain she had a right to waive that agreement at any time thereafter; and it is also plain, from the allegations of the complaint, that she did waive it, after notice, at the time she signed the request for the pass. If, at the time she made the contract for her employment, the agreement was that she should have transportation whenever and wherever she desired, and that the consideration for such transportation was her employment, it was not necessary that she sign the application which she did sign. But, by signing the application, she thereby expressly agreed that the delivery of the pass to her was a pure gratuity and supported by no consideration whatever. This was a clear waiver of her prior contract and she was bound thereby, because she made a new contract at that time; and the contract of employment, if it was made as she alleged at the time she was employed, was, to that extent, waived. She was, therefore, under the allegations of her complaint, a mere gratuitous passenger, and the respondent was not liable to her for injuries caused by its negligence.

We are therefore of the opinion that the complaint fails to state a cause of action, and the judgment is affirmed.

CROW, C. J., CHADWICK, PARKER, and MORRIS, JJ., concur.

MAIN, J. (dissenting)—I am unable to agree with the conclusion reached in the majority opinion. If the facts are as alleged in the complaint—and for the purposes of this decision they must be conceded to be such—the plaintiff had earned, as a part of the consideration for her services, the transportation at the time she applied for it. If the transportation had been earned by the rendition of services, she stood in the same position as though she had parted with any other valuable consideration. This seems to be recognized in the prevailing opinion. But it is held that, notwithstanding this fact, at the time she applied for the transportation, the prior contract was waived, and the stipulation releasing the company from damages was binding. There are two reasons why the contract was not waived. The first is, if the transportation had been earned as a part of the consideration for the employment, her right thereto became unconditional, and an attempted waiver would be against public policy. In the *Harris* case, an excerpt from which is quoted in the majority opinion, after stating the general rule that, if the transportation constituted a portion of the consideration for the services, a person applying for it would be a passenger for hire, just the same as anybody else who parts with anything of value for transportation, it was said:

“It follows from this rule, and from the finding of the jury, that the transportation in this case was not a gratuity, but constituted a part consideration for the deceased’s services; that the deceased was a passenger for hire and entitled to protection as such passenger, which public policy does not permit him to waive.”

In the second place, if the transportation had been earned and the plaintiff’s right thereto unconditional, there would be no consideration for the contract of waiver.

Whether the plaintiff can prove her allegations is foreign to the inquiry, since the case is here upon the sufficiency of the complaint.

ELLIS and GOSE, JJ., concur.

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[No. 11768. Department One. July 18, 1914.]

E. R. B. REMLY, *Respondent*, v. ELMER SWANSON *et al.*,
Appellants.¹

SALES—DELIVERY—EVIDENCE—SUFFICIENCY. Upon an issue as to the delivery of lumber sold, evidence of a witness that he knew the lumber sold had been delivered, although he did not see it delivered, is sufficient to make a *prima facie* case, in the absence of other evidence.

NAMES—ASSUMED NAMES—CERTIFICATES—SUFFICIENCY—STATUTES—CONSTRUCTION. A certificate as to the assumed name under which plaintiff was doing business complies with Rem. & Bal. Code, § 8369, requiring it to set forth the post office address of the parties interested, where it recites that the plaintiff is engaged in and conducting a general retailing business at Metaline Falls, Pend Oreille county, state of Washington.

SAME—ASSUMED NAME—CERTIFICATE—SUFFICIENCY. A certificate as to the assumed name under which a party was doing business need not give the name of her husband as a party interested, under Rem. & Bal. Code, § 8369, when she was the owner of the business and her husband was merely a manager.

Appeal from a judgment of the superior court for Pend Oreille county, Jackson, J., entered April 11, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Tolman & King, for appellants.

Reading & Trumbull, for respondent.

MAIN, J.—The purpose of this action was to recover the balance alleged to be due on account of lumber sold and delivered. The cause was tried to the court without a jury. At the conclusion of the plaintiff's testimony, the defendants challenged the sufficiency of the evidence to sustain the judgment and moved for a dismissal of the action.

¹Reported in 141 Pac. 899.

This motion was overruled. The defendants elected to stand upon the record as it then was and declined to offer any evidence. Judgment was entered for the plaintiff in the sum of \$219.05, from which the appeal is prosecuted.

The principal controversy between the parties is over the quantity of lumber actually delivered. For the purpose of showing the quantity of lumber furnished, the respondent offered in evidence her books of account. In addition to this, the husband of the respondent, who was manager of the Metaline Falls Lumber Company, testified that, while he did not see all the lumber actually delivered, he knew it had been delivered. His means of knowledge was not disclosed, either upon direct or cross-examination. The appellants claim that, owing to certain infirmities in the books of account, they were inadmissible in evidence. It is unnecessary, however to pursue this question. The evidence of the respondent's husband that he knew the lumber was delivered was sufficient to make a *prima facie* case and sustain the judgment, in the absence of any opposing testimony.

Upon the trial, there was introduced in evidence, over the objection of the appellants, a certificate which recited that the respondent was engaged in conducting a general business in retailing lumber and building supplies in Metaline Falls, Pend Oreille county, under the assumed name of Metaline Falls Lumber Company, and that she was the only person having any interest therein. Section 8369, Rem. & Bal. Code (P. C. 377 § 21), provides, among other things, that no person shall conduct or transact business under an assumed name unless there be filed with the county clerk of the county in which the business is conducted, a certificate, which "shall set forth the designation, name or style under which said business is to be conducted, and the true and real name or names of the party or parties conducting or intending to conduct, the same, or having an interest therein, together with the post office address or addresses of

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said person or persons . . .” The appellant claims that the certificate fails to conform to the statutory requirement as to the recital of the post office address of the person conducting or transacting the business. The certificate recites, however, that

“E. R. B. Remley is engaged in conducting a general business in retailing lumber and building supplies at Metaline Falls, Pend Oreille County, State of Washington, under the assumed firm name and style of Metaline Falls Lumber Company . . .”

While the certificate might have been couched in more pointed language, in the absence of contravening evidence, it would seem only a reasonable inference that the respondent's address was at the place where the certificate recited she was conducting the business.

Another objection to the certificate was that it did not contain the name of the respondent's husband, it being contended that he was interested in the business. But this contention is met by the evidence, which shows that the business was owned by the respondent, but managed by her husband.

The judgment will be affirmed.

Crow, C. J., ELLIS, GOSE, and CHADWICK, JJ., concur.

[No. 11890. Department One. July 18, 1914.]

MARY GREEN FISKE KORSTAD, *Appellant*, v.
LEWIE WILLIAMS *et al.*, *Respondents*.¹

ASSOCIATIONS — CONTRACTS — LIABILITY OF MEMBERS — ACTIONS — PLEADING — DEFENSES. The fact that the local members of a fraternity entered into a lease executed by the president and secretary in the name of the association, does not preclude the landlord, in suing for rent, from alleging that the members were a voluntary association and contracted as copartners; and it would be no defense to the action that there was a duly organized corporation in another state of the same name assumed by the tenants in the lease.

Appeal from a judgment of the superior court for King county, Humphries, J., entered January 22, 1914, upon granting a nonsuit, dismissing an action on contract, and for damages, after a trial to the court. Reversed.

J. William Hoar and *Martin Korstad*, for appellant.

Arthur C. Dresbach and *Willett & Oleson*, for respondents.

CHADWICK, J.—Plaintiff brought this action to recover for rents due under a contract, the preamble of which reads as follows:

“Seattle, King Co. State of Washington.

“This lease made and entered into this eleventh day of March, 1909, by and between Mary E. Green and Mary Green Fiske, hereinafter referred to as the owners, and the Alpha Tau Omega Fraternity, by Lewie Williams, its President and Russell Parker, its Secretary, hereinafter referred to as the tenant, Witnesseth: . . .”

The lease is signed Alpha Tau Omega Fraternity, by Lewie Williams, Pres., and Russell Parker, Secy.

Other causes of action not necessary to be mentioned here are set up. It is alleged in the amended complaint that “the defendants above named at all times herein mentioned were and now are associated together as an association doing business under the name of Alpha Tau Omega Fraternity and

¹Reported in 141 Pac. 881.

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as such are copartners." During the progress of the case, the court struck out the words "and as such are copartners." This the trial court held to be a conclusion of law. The case came on for trial before the court without a jury, and the following proceedings, among others, were had:

"Mr. Willett: The Court will notice that it (the amended complaint) does not state what they are—whether the fraternity is incorporated or not. The Court: A co-partnership. Mr. Hoar: We alleged, if the Court pleases, that they were co-partners. They made a motion to strike that, as a legal conclusion, and I believe you sustained them on that ground. The Court: Oh, you alleged they were co-partners? . . . Mr. Willett: The Court properly struck it. I want to call the Court's attention to the first paragraph of the first affirmative defense. The Court: I did not strike that out, did I—where they say they are doing business as a co-partnership? Mr. Willett: Well, that is not what they alleged. They said as an association, as such association they were co-partners. That is a legal conclusion, and your Honor struck it. The Court: I ought not to have done that. Mr. Willett: It is there—it is an allegation that they are co-partners. I think that it is a conclusion of law that they are co-partners. That is what that is. Your Honor properly struck it without any question. The Court: Well, now we will try it as a co-partnership. Mr. Willett: Well, we are perfectly willing; because they are not. The Court: Well, we will go ahead now. Let me see, they were a co-partnership doing business under that name. There are fraternities incorporated and fraternities not incorporated and if the fraternity boys are doing business under this name and have their presidents and secretaries or agents and rent a building, why then it has to be something. Mr. Willett: It is. The Court: It has got to be something, if they get people into court and they are doing business that way. Mr. Dresbach: They cannot play hide-and-go-seek with us. If they are going to be a co-partnership, why then we want them to stick to it. The Court: Well, they are not a corporation. Of course, if they were a corporation, they would be sued as a corporation. Mr. Willett: Well, that does not follow:—They should have sued us as a corporation, if the Court pleases.

The Court: Is it a corporation or not? Mr. Willett: It is the Alpha Tau Omega Fraternity, a corporation. Mr. Korstad: Where are your articles filed? Mr. Willett: It is a Maryland corporation. Mr. Korstad: Yes, but they are not organized to do business in this state. Mr. Willett: It does not make any difference; you cannot sue us. The Court: Well, I will tell you; you ought to raise that before you get to trial. I sued some parties as a partnership and that they were not, but corporations, and got thrown out of court. Mr. Willett: That is the way they are going to be. The Court: Brother Korstad, you ought to have alleged they were a corporation. Mr. Korstad: I have been unable to find such facts. If they can show me, why we will concede that fact, your Honor. Mr. Willett: We are not required to file articles of incorporation out of the state,—only of a business corporation. The Court: What is the fact about that, now? I will ask you about that. Here is a corporation organized under the laws of the State of Maryland. It has got its president and secretary and corporate seal and doing business as a corporation. Mr. Willett: For social and fraternal purposes only, you understand; not business. The Court: Well, I say, it does not make any difference. It is a corporation and has got its president and secretary and seal and board of trustees, I suppose; got all of them, hasn't it? Mr. Willett: Oh, yes. Mr. Dresbach: It is a national organization. The Court: And the corporation having rented this place, why the boys would not have any liability at all. Isn't that a fact, now as a matter of law? Mr. Willett: That is a fact, and the corporation is not liable unless it was executed by the corporation. That is the situation. . . . The Court: Who signed the lease? Mr. Hoar: It is the local officers, not the national officers at all. It is people who claim to be the officers of a local bunch of fellows here. The Court: Let me see the lease. . . . The Court: Why it purports authority on the face of it. . . . It looks to me like you have got this thing terribly mixed up here. 'Comes now the plaintiff and for cause of action against the defendants alleges that said defendants above named at all times were and now are associated together and are doing business under the name of the Alpha Tau Omega Fraternity and as such are co-partners.' Now, you cannot come

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within a mile of proving that, according to this lease. Mr. Hoar: I don't see why, Your Honor. The Court: Why, because it is a corporation. . . . Yes, sued on contract. Why, of course, I never knew that until now, that that was the kind of a case you had. Mr. Willett: They are not sued on occupation. They are just sued on contract. The Court: I had supposed you were suing these boys as a kind of an association or co-partnership. I had no idea you were bringing it up this way. . . . Are not these gentlemen the president and secretary? They say so. Mr. Hoar: Of the local organization, your Honor, of the people who actually occupy the premises. The Court: Where is this incorporation recorded? Mr. Hoar: Well, I don't know, your Honor. We don't know anything about that. . . . So far as the renting of these premises is concerned, your Honor, this corporation is merely a voluntary association. The lease was not entered into with them as a corporation, but merely as a voluntary club and you know many of them have a president and secretary. The Court: Yes, but this lease is entered into as a corporation. Mr. Hoar: The national corporation did not have anything to do with it. The national organization did not sign it. The Court: Well, the boys did not sign it, either. 'The Alpha Tau Omega Fraternity, by Lewie Williams, President, and Russell Parker, Secretary.' . . . Why didn't you sue the national corporation for this debt? Mr. Hoar: Because we were not dealing with the national corporation, if the Court pleases. The Court: Here it is here. Mr. Hoar: The National officers are not signed to that at all. Lewie Williams was merely president of the local organization here. The Court: Let me see what I have got here. 'This lease made and entered into this 11th day of March, 1909, by and between Mary Green Fiske.' If that is not signed by a corporation, it is funny to me. Mr. Hoar: It does not say so, your Honor. Mr. Korstad: It does not say incorporated. The Court: Well, it purports a corporation. Mr. Hoar: Not necessarily, your Honor. You take a voluntary club like this, a club of fellows who live together,—they say they are for social purposes. The Court: Well now, if it should turn out from the evidence that this was a corporation, as Tom Watson said about the Populist party, 'Where are we at?' Mr. Hoar: Well, it all depends on the way they sign

that, if the Court pleases. The Court: Well, it is a corporation that signed it. Mr. Hoar: No, it does not say so, your Honor, because the President does not always sign as a corporation. The Court: It purports it is a corporation. Mr. Hoar: All these clubs and any other club would have their president and their secretary and even political meetings without any formation, elect their own presidents; and so it would not signify. The Court: It looks to me for your own benefit that, where this is a corporation as plain as this is, on this lease, you should have sued the corporation. Mr. Hoar: But if your Honor pleases, this lease was made for the benefit of the members who live here in Seattle and who attend the college and was signed by them for their special benefit. It was not signed by the national organization. They lived there. They had their own manager that ran the house. The Court: Well, this man is either misrepresenting himself as president, and this secretary, or they are the president and secretary of the corporation. . . . Mr. Hoar: Here is a case where the men attending school here, go over and look at the house and all dealings were made with the local organization, nothing said about the national organization; and simply signed on behalf of the local men, and the national organization had nothing to do with it. We can clearly show that. The Court: Well, how are you going to show that? Mr. Hoar: By the testimony of the plaintiff who entered into the agreement. . . . I would like to show just who these parties were she was dealing with at the time. Now, Mrs. Korstad— The Court: I will sustain the objection and give you an exception. Q. I will ask you with whom you were dealing at the time the lease was signed? Mr. Willett: Just a moment. I object to that, if the Court pleases, as calling for a conclusion from the witness and attempting to vary the terms of a written instrument. The Court: Sustained. Exception. Q. I will ask you if, at the time this lease was signed, you were informed that there was any such organization, a national organization or national corporation, known as the Alpha Tau Omega Fraternity? Mr. Willett: I object to that. A. No, I was not. The Court: Sustained. It shows on the face of it. Mr. Hoar: It says, The Alpha Tau Omega Fraternity, your Honor, but it does not say that it is a corporation. The

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Court: Yes, it says by president and secretary. Mr. Hoar: It says by president and secretary, but it does not show that is the national organization. It does not show it was a corporation. The Court: It shows she was dealing with a corporation. Mr. Hoar: No, it does not, your Honor. The Court: I will sustain the objection. You can make up your record. I don't think you can recover against these boys but you can make up your record. Q. I will ask you, Mrs. Korstad, in all of your dealings prior to and at the time of the signing of this lease, with whom you were dealing,—whether with the local members of the Alpha Tau Omega Fraternity or with the national organization? Mr. Willett: I object to that, if the court pleases. The Court: sustained, and exception. I think the lease shows she was dealing with the fraternity as a corporation. That does not estop you from suing the proper party. The Court: I guess the boys have got you. Mr. Willett: Absolutely. Mr. Hoar: If your Honor please, that would be a very unjust ruling to let those people hold those premises and still not pay for it, when they have been holding it two and a half years and not binding them for rent. The Court: I know, but you contracted with this corporation, and these boys are simply members of a certain fraternity. Mr. Hoar: We have not contracted with a corporation, if your Honor please. We have contracted with these boys. The Court: I think you have. Mr. Hoar: No matter what term they use, they— The Court: You would be out just the same, because if you attempted to prove that each one of these boys contracted with you, you could not do it. And where a name is used which imports a corporation, under the authorities, and you deal with a name that imports a corporation and sign it as president and secretary, why you are estopped, yourself, to say it is not a corporation."

It will be seen that, contrary to the first and correct impulse of the trial judge, the allegation that the defendant association was a copartnership should not have been stricken, and after reasoning in an ever widening circle away from the fundamental principle of the law that the real parties to a contract and those liable thereunder may be shown under an allegation of copartnership or voluntary association, and that the defendants not named in the lease

might be shown to have acted through the agency of the president and secretary of the alleged voluntary association, he held that the lease purported to be signed by a corporation and that no recovery could be had. There is nothing in the pleadings or the evidence, so far as the court took any testimony, to show that plaintiff and her assignor ever contracted with the association as a corporation. She is not bound by any rule of estoppel apparent to us from a careful inspection of the record, and we will not discuss this and other abstract propositions of the law so learnedly discussed by counsel, for it is our opinion that a mere statement of the case is enough without consuming our time or space in our reports.

However, it may be understood, in the event of a new trial, that the fact that there is a national association known as the Alpha Tau Omega Fraternity, incorporated under the laws of the state of Maryland, would in no way be a defense to the action in the case at bar. It is not shown, nor do we understand it to be contended, that that corporation was in any way a party to this contract. The parties defendant had a legal right to contract, if they did contract, with the plaintiff and her assignor under any name they saw fit to use. Having contracted, it would be an injustice calling for the operation of the doctrine of estoppel to now say that they contracted as a corporation and that the proof of it lies in the fact that the lease was signed by one as president and another as secretary, and that there is somewhere on the face of the earth a corporation having the name under which they contracted.

The judgment is reversed, and remanded for further proceedings.

Crow, C. J., Gose, Ellis, and Main, JJ., concur.

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Opinion Per GOSE, J.

[No. 11852. Department One. July 21, 1914.]

CHRISTINA GUNDERSON, *Respondent*, v. JOHN BIEREN *et al.*,
Appellants.¹

ANIMALS—VICIOUS ANIMALS—DAMAGES—LIABILITY. The owner of a vicious bull who knows of its vicious propensity is liable for any injury it may inflict, regardless of the owner's negligence.

SAME—VICIOUS ANIMALS — INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A stock buyer, attempting to drive a bull from a corral, is not guilty of contributory negligence, as a matter of law, in striking the bull with a whip and setting his dog upon him, where there was evidence that he was riding a first-class saddle horse, and was charged so suddenly that he could not get out of the way, and that the owner of the bull had assured him that the bull was "not mean."

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 7, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Englehart & Rigg, for appellants.

John H. McDaniels and *E. K. Brown*, for respondent.

GOSE, J.—Plaintiff brought this action to recover damages for the death of her husband. There was a verdict and judgment in her favor. The defendants have brought the case here for review.

The deceased, at the time of his death, was an experienced stockman in the employ of one Thomas Meaghers, who was engaged in conducting a meat market and buying and handling cattle. A bull, which the deceased had bought of the appellants for his employer, attacked the horse which he was riding, and threw him over and upon the deceased with such force as to fracture the base of the skull, causing an injury from which he died on the following day. The respondent brought this action, alleging that the bull was

¹Reported in 142 Pac. 685.

vicious, that the appellants knew it, and that they represented to the deceased that the bull was safe and gentle. The appellants joined issue on these allegations, and alleged affirmatively that the death of the deceased was brought about by his own negligence.

The testimony tended to show the following facts: The deceased and one Louis Meaghers, a son of the employer of deceased, went to the appellants' premises for the purpose of getting the bull. They found the bull in the appellants' corral with a number of cows. Louis Meaghers testified that "when we went to drive the bull out, the bull shook his head, and Arthur [meaning deceased] said [to the appellant husband] 'Is that bull mean?' and Bieren said, 'No, that bull is all right. I am no more afraid of him than I am of you.' " He further said that the appellant husband then drove the bull into the road "with a club;" that the bull, a few minutes later, followed the cows into another inclosure; and that, after some controversy over the price of the bull, and after the deceased had failed to get in telephonic communication with his employer, the deceased followed the bull into the inclosure for the purpose of driving him into the road and thence to town; that he (witness) offered to get the bull, but that the deceased said that he would get him as he had a faster horse; that when the deceased undertook to drive the bull out of the inclosure, he would not move; that the deceased first used the whip upon the bull, and then put his dog on him; that the dog nipped his heels "a few times;" that the bull made a quick turn and charged the horse which the deceased was riding; that he butted the horse three times, and then picked him up, carried him about thirty feet, and threw him upon the deceased; that after the horse had fallen, he butted him once and then walked away; that the deceased was riding a first-class saddle horse; that the appellant husband, after the accident, said, "I thought you fellows could handle any kind of a bull;" that witness answered that he had never before seen a bull attack any one

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without warning, and that the appellant replied, "I had to shoot him once when he got into the field, and my boy shot him once."

Carl Kriger, a witness for the respondent, testified that, about a month before the accident, he and his brother took a cow to the bull for service; that the appellant said to them in reference to the bull "to watch him; that he is cross sometimes," and that the bull came at him three times. His brother testified that "the bull made three runs at Carl's horse and he got out of the way," and that the appellant said to them, "Be careful; that he is mean." John Nordene testified that the appellant said to him, in speaking about the bull, "Watch out for him; that he was cross," and that he said the boys had shot him. Frank Brown testified that the appellant said to him "to watch him; that he was dangerous," and said that he had had to shoot him. Fred Hinman testified that he took a cow to the bull, and that the appellant said to him, "Be careful," that the bull could not be trusted and was dangerous. Lee Smathers testified that the appellant told him that the bull had learned to fight horses when he was a calf. Another witness testified that the appellant told him that the bull would fight horses. John Snider testified that, a short time before the accident, while he was working for appellant, the bull put him upon a rock pile, and that the appellant told him afterwards to look out for him. Peter Willis testified that he took a cow to the bull for service, and that the bull charged him twice; that, upon a second charge, he staggered his horse. Lou Bender, who was with him, corroborated this statement, and stated that the appellant said the bull did not like horses. These things occurred within a few months prior to the death of the deceased. The testimony shows that the appellant and one of his sons had shot the bull a number of times with bird shot. They explained this by saying they did it in order to make him drive. The appellant testified that he did not tell the deceased and Louis Meaghers that

the bull was gentle; that after the deceased had finished telephoning and started a second time to get the bull, he warned him to be careful, and denied generally that he had warned people that the bull was dangerous.

The appellants contend, (1) that the court erred in denying their motion for a nonsuit at the close of the respondent's evidence; and (2) that the court erred in not granting the appellants' motion for judgment *non obstante*. Their contention is that the deceased was guilty of contributory negligence, as a matter of law, in using his whip upon the bull to the extent that he did, and in putting the dog on the bull, and hence that there can be no recovery.

The rule in relation to domestic animals is that the owner or keeper of a vicious animal, who knows its propensity to do mischief, is liable for any injury it may inflict. 2 Cyc. 268. In *Harris v. Carstens Packing Co.*, 48 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164, we said, in substance, that, if the animal is vicious and the owner knows it, he is accountable for any injury done by it, without proof of negligence. See, to the same effect, *Johnston v. Mack Mfg. Co.*, 65 W. Va. 544, 64 S. E. 841, 139 Am. St. 979, 24 L. R. A. (N. S.) 1189.

We cannot adopt the appellants' view that the deceased was guilty of contributory negligence as a matter of law. In this class of cases, like all other personal injury cases, the rule is that, if reasonable men may honestly entertain a difference of opinion upon the facts, the question is one for the jury. *Meier v. Shrunk*, 79 Iowa 17, 44 N. W. 209; *Glidden v. Moore*, 14 Neb. 84, 15 N. W. 326, 45 Am. Rep. 98; *Brooks v. Brooks*, 21 Ky. Law 940, 53 S. W. 645. In the *Meier* case, the court held that it was not negligence, as a matter of law, for the plaintiff to strike a bull with his cane before it attacked him, the jury having found that the plaintiff did not provoke the bull to make the attack. In the *Brooks* case, the owner of a cow had put her in one of the pens in the stockyards. A stock buyer went into the pen to ex-

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amine cattle to see if there were any there that he desired to buy, and was injured by the cow. It was contended, upon the one hand, that the cow was vicious and that the owner knew it; upon the other, that the cow was not vicious. A plea of contributory negligence was also interposed, which the court sustained by giving a peremptory instruction to find for the defendant. The court said, in substance, that it was reasonably clear that the injured party was not guilty of contributory negligence; that he was proceeding to examine the cattle in the stock yards in the customary manner. Here the testimony of Louis Meaghers is that the bull refused to move at the command of the deceased; that the latter then used the whip upon him a few times, and that he still refused to move; that he then put the dog upon him, and that the bull suddenly whirled and charged him with such swiftness that, although he was riding a first-class cattle horse, he was not able to get out of his way.

The appellants have cited, among other cases, *Miller v. Atlantic Refining Co.*, 210 Pa. St. 628, 60 Atl. 306; *Tolin v. Terrell*, 133 Ky. 210, 117 S. W. 290; *Bush v. Wathen*, 104 Ky. 548, 47 S. W. 599, and *Keightlinger v. Egan*, 65 Ill. 235. In the first two cases, it was held negligence for one to voluntarily walk behind and near the heels of a horse or mule without speaking and without giving any warning of his presence. In *Bush v. Wathen*, it was held that one who maltreats or annoys a dog, to such an extent as to cause it to bite him, is guilty of negligence which exempts the owner from liability. In the *Egan* case, it was held that, if one voluntarily irritates and aggravates a dog and the dog bites in repelling the aggression and not from a mischievous propensity, he cannot recover. It is obvious that none of these cases meets the facts before us.

In support of this contention, the appellants also argue that bulls as a class are dangerous. A witness testified that "all bulls are more or less dangerous." Of course, a bull is a bull, and, as one of the witnesses said, a bull has a bull dis-

position. It must not be overlooked, however, that Louis Meaghers testified that they asked the appellant husband the direct question, "Is that bull mean?" and the appellant answered, "No, that bull is all right. I am no more afraid of him than I am of you." It cannot be said, as a matter of law, or as a result of common observation, that bulls as a class are dangerous. They may be, as a witness said, more or less dangerous. Common observation and experience teach that many of them, and indeed it may be said that most of them, are not dangerous. But, however this may be, if the testimony of the witness is to be believed (and that was a question for the jury), the deceased had the assurance of the appellant that the particular bull was not dangerous.

Upon the whole record, we do not feel warranted in disturbing the verdict of the jury. The judgment is affirmed.

Crow, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 11366. Department Two. July 22, 1914.]

In re FIFTH AVENUE WEST.

R. D. HILL *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — EXCESSIVENESS. An assessment for benefits for a street improvement for the purpose of eliminating excessive grades between the termini of the improvement, is shown to be excessive and arbitrary, where it appears that most of the cost was assessed against the property of one party, who received the principal part of the jury's award for damages for property taken and damaged, a cut in front of the property increased the grades of cross streets and alleys, which were already excessive, and the assessment exceeded the value of the property put upon it by the assessor for the purposes of general taxation and was more than two-thirds of the owner's estimate of the value, and grossly exceeds the assessments placed upon adjacent and contiguous property.

¹Reported in 141 Pac. 1035.

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Opinion Per FULLERTON, J.

EMINENT DOMAIN—AWARD—CONCLUSIVENESS. The jury's award for damages for land taken and damaged by a street improvement is conclusive if not reviewed in the condemnation proceeding, and cannot, if excessive, be corrected by the eminent domain commissioners as an excessive assessment for benefits against the property.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 8, 1913, confirming an assessment roll on appeal from the eminent domain commissioners, after a hearing on the merits. Modified.

Milo A. Root and R. D. Hill, for appellants.

James E. Bradford (William D. Covington and C. B. White, of counsel), for respondent.

FULLERTON, J.—In October, 1910, the city of Seattle, by ordinance, directed the improvement of Fifth avenue west from Barrett street on the south to West Dravus street on the north, and West Dravus street from Fifth avenue west on the east to Seventh avenue west on the west. The improvement directed consisted of a widening of the streets named by taking certain private property lying to the west and south thereof. Condemnation proceedings were instituted to acquire the necessary property, in which an award was made to the owners of the property of \$8,973.10. The property taken was owned principally by Reuben D. Hill and Henrietta L. Hill, and their proportion of the award was \$8,835.60. The ordinance directing the improvement to be made provided that the cost and expense thereof should be assessed against the property benefited; and to that end, the court referred the matter of the assessment to the board of eminent domain commissioners, who returned an assessment roll into court in which they found that the entire cost of the improvement was \$10,602.74. Of this sum, they assessed to the city of Seattle, because of the extra width of the street, \$240.15, and the remainder to the property benefited. The Hills owned the greater part of the property bounded by West Dravus street on the north, Fifth avenue west on the

east, Barrett street on the south, and Seventh avenue west on the west; and against this property an assessment was levied of \$7,112. The Hills excepted to the assessment, and a hearing was had thereon in the superior court, at which hearing the assessment roll was confirmed. This appeal is prosecuted by the Hills from the order of confirmation.

The appellants' assignments of error can be reduced to the proposition that the board of eminent domain commissioners acted arbitrarily in assessing their property; that is to say, the commissioners made the assessment without regard to benefits, with the result that the appellants' property is made to bear the great bulk of the cost of the improvement, while other property, and particularly the public at large for whose benefit the improvement is chiefly made, is assessed but nominally when compared therewith.

The evidence shows that the grades of the streets between the terminals of the improvement, as they at present exist, are too excessive for practical use. Fifth avenue west, from its junction with Barrett street north to its junction with West Dravus street, has a descending grade of some fifteen per centum; while the latter street, from that point to its junction with Seventh avenue west, has an ascending grade of a somewhat less per centum but still excessive. By the use of the land taken from the appellants, these grades are practically overcome between the terminals of the improvement. The contemplated purpose is to make two tracks between these terminals, the one skirting the remaining lands of the appellants, and the other lower down, with a sloping bank between them. It also permits the making of a third track with still a different grade along West Dravus street from its junction with Seventh avenue west to certain streets connecting with that street from the north. The upper one of these tracks connects the main thoroughfare coming in from the north with the thoroughfare on the south extending to the heart of the city, thus affording a practical street with

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easy grades between points which are now connected by streets having impractical grades.

The appellants' property is divided by streets and alleys running north and south through the same; it having been platted in that manner under the direction of the city authorities. These streets now have excessive grades which will be further increased by the construction of the improved streets, as such improvement contemplates a cut in front of the property which will leave an embankment ranging in height for the greater part of the distance of from six to fifteen feet.

On the question of the excessiveness of the assessment, it was shown that the assessment levied against the property by the eminent domain commissioners exceeded the value put upon it by the assessor for purposes of general taxation, and was more than two-thirds of the value placed upon it by its owners; one of them testifying that he would gladly take ten thousand dollars for it, even if clear of encumbrances. The assessments placed upon the property were also grossly in excess of the assessments placed upon adjacent and contiguous property having access to the improved street upon equal, and in many instances, lesser grades. For example, the western tier of lots on the appellants' property is assessed at \$662.14 while a tier of lots directly across the street therefrom having a greater area and equal access to the improved street is assessed at but \$129. The other differences may not be in all instances as glaring as this, but the assessment on the appellants' property is, in each instance, from three to four times that of like and similarly situated property. It will be remembered, furthermore, that the present assessment does not pay for a completed street in front of the appellants' property. On the contrary, the assessment but pays for the land taken, and the property is again to be assessed when the street is graded and otherwise improved so as to make it passable for vehicles. The net result of the proceedings being, if this assessment is allowed to stand, that

the appellants will receive for land taken and damaged but \$1,723.60 for which the jury awarded them \$8,835.60.

The general rule governing the action of the courts, when reviewing assessments of benefits, we have often stated. The courts will not concern themselves with mere differences of opinion as to the actual benefits conferred, but it must appear from the proceedings as a whole that the authority levying the assessment has acted arbitrarily in disregard of the actual benefits, or has proceeded upon a fundamentally wrong basis. We have no hesitancy, however, in saying that the record shows arbitrary action on the part of the eminent domain commissioners in the present instance. The very fact that they found so large a part of the benefits to have been conferred upon the property of the persons who received the award for the property taken is alone sufficient to excite inquiry as to their good faith. It raises the suspicion that they thought the jury's award excessive, and sought to correct it. But the amount of the award made by the jury was of no concern of the eminent domain commissioners. If the award was in excess of the actual value of the property taken and damaged, it should have been corrected in the condemnation proceeding itself by some of the methods provided by law for the correction of excessive verdicts. When the award has been allowed to become final in its effect it must be accepted as a verity, and the subsequent proceedings must be governed by the principle that it is final and not subject to further inquiry or correction. But whatever may have been the theory on which the eminent domain commissioners acted, we think the evidence clearly demonstrates that the appellants' property has not only been assessed more than its proportionate share of the cost of the improvement, but grossly in excess of the benefits conferred upon it by the improvement.

This conclusion requires a modification of the assessment roll by a reduction of the assessment upon the appellants' property. The amount of the reduction that ought properly to be made is not, of course, easily determinable, but we think

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that an assessment on the property in a sum exceeding one-third of that actually levied would be excessive. The judgment of the trial court, therefore, will be set aside as to the appellants, and the cause remanded with instructions to reduce the assessment upon their property to a sum not exceeding one-third of the sum levied by the eminent domain commissioners, and confirmed as reduced.

CROW, C. J., PARKER, MORRIS, and MOUNT, JJ., concur.

[No. 11790. Department One. July 22, 1914.]

J. J. CALDWELL, *Respondent*, v. E. C. KLYCE, *Appellant*.¹

APPEAL AND ERROR—RECORD—ABSTRACT OF EVIDENCE—NECESSITY. 3 Rem. & Bal. Code, § 1730-1, requiring the appellant to file an abstract of the record applies both to actions at law and in equity, and notwithstanding appellant's only assignment of error was the refusal of a nonsuit requiring an examination of all the evidence by the appellate court.

MASTER AND SERVANT—EMPLOYMENT—DISCHARGE—CONDITIONS—QUESTION FOR JURY. A contract of employment providing for its termination for "any good reason," implies that an issue on that subject is to be determined by a court or jury.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 4, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Appeal dismissed.

Byers & Byers, for appellant.

Edwin H. Flick and *C. E. Hughes*, for respondent.

CHADWICK, J.—Plaintiff had been in the employ of defendant for about four years prior to November 1st, 1909. On that day, the parties entered into a contract, the material parts of which follow:

"In consideration of the diligence, sobriety and integrity on the part of the party of the second part in the faithful

¹Reported in 141 Pac. 1042.

performance of the duties of the said party of the second part, said E. C. Klyce & Company, party of the first part, hereby agrees under the following conditions to pay to J. J. Caldwell, party of the second part, ten (10) per cent of the net gain of the said commission business for one year or twelve calendar months ending the thirty-first day of October, nineteen hundred and ten, said percentage to be the salary of the said party of the second part for the aforesaid period of one year, said percentage to be paid at the end of one year from the date hereof except as hereinafter provided. It is further agreed that in the event of the services of the said party of the second part being for any good reason discontinued within a period of six months from the date of this agreement, the party of the first part shall not pay to the party of the second part any of the said percentage, and in the event of the services of the said party of the second part being for any good reason discontinued within the said year and after six months from the date of this agreement, said party of the first part shall then pay to the party of the second part said percentage for only six months from date hereof. . . .

"It is further agreed, that the party of the first part shall pay to the party of the second part, at the end of every month during the period of his services, seventy-five (\$75) dollars, this amount to be advanced by the said party of the first part to the party of the second part as a portion of the aforesaid percentage, to be deducted from said percentage at any time a full settlement between the said parties of the said parts shall be made."

Defendant discharged plaintiff in October, 1910. Plaintiff brought this action for an accounting and to recover the balance due him under the contract. Defendant justified, claiming a breach of the contract in that plaintiff had been so addicted to the use of intoxicating liquors that he had not discharged his duties with diligence, sobriety, and integrity. The court found generally, in favor of the plaintiff, that there had been a substantial compliance with the contract, and rendered a judgment for the sum of \$903.76, with interest.

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Plaintiff moves to dismiss the appeal for the reason that there is no abstract of the testimony. Counsel say in their abstract:

"In view of the fact that the case in this court is tried *de novo*, we do not set forth the evidence, because we are not urging any point by reason of the admission of the evidence, or the refusal to admit evidence, but are urging our motion for a non-suit which will require the examination of all the evidence by the court, and we do not understand that the office of the abstract is to set out the testimony unless some question is raised or objection to its introduction or to the court's refusal to admit evidence offered."

Defendant has entirely misconceived the purpose of the statute. Laws of 1913, ch. 116, p. 349, § 1; 3 Rem. & Bal. Code, § 1730-1. No distinction is there made between actions at law and suits in equity. Notwithstanding some assignments going to the law of the case, the only question in this case is one of fact. The contract itself makes an issue in the event of discharge. Whether plaintiff was discharged for "any good reason" was not to be decided by defendant without a right of hearing. On the contrary, the words imply that the cause, in the event of a difference of opinion, will be inquired into by a court or jury.

This case falls squarely within *Ollar-Robinson Co. v. O'Neill*, ante p. 1, 141 Pac. 194, and an order will be entered dismissing the appeal.

Inasmuch as counsel seem to have honestly mistaken the purpose of the statute, and their failure to abstract the evidence cannot be charged to neglect or an ulterior design, we feel that we should say that we have looked into the record and are satisfied that the findings and judgment of the court are sustained by a preponderance of competent evidence.

Appeal dismissed.

Crow, C. J., MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11729. Department Two. July 22, 1914.]

JACOB BERNARD, *Respondent*, v. THE CITY OF NORTH
YAKIMA, *Appellant*.¹

APPEAL—REVIEW—DISCRETION—NEW TRIAL. Under Rem. & Bal. Code, § 399, authorizing a new trial when the damages are "excessive or inadequate," the grant of a new trial because of inadequate damages will not be reviewed except for abuse of discretion.

NEW TRIAL—GROUNDS—INADEQUATE DAMAGES — DISCRETION. It is not an abuse of discretion to grant a new trial on account of inadequate damages, in an action for the death of a minor child, where the jury awarded plaintiff but fifteen dollars, the amount paid out for burial expenses, and there was evidence of pecuniary loss.

NEW TRIAL—CONDITIONS—INCREASING AMOUNT. The grant of a new trial on account of inadequate damages may be made conditioned on the appellant's refusal to consent to a judgment in a larger sum.

Appeal from an order of the superior court for Yakima county, Grady, J., entered September 16, 1913, vacating a verdict for the plaintiff, in an action for wrongful death. Affirmed.

Guy O. Shumate and *Robert N. Denham, Jr.*, for appellant.

McAulay & Meigs, for respondent.

MORRIS, J.—In this action, the respondent sought to recover damages alleged to have been sustained in the wrongful death of his minor female child, of the age of seven years. The case was tried before a jury, and a verdict returned in favor of respondent in the sum of fifteen dollars, which was the amount alleged in the complaint to have been paid out for burial expenses. Respondent filed a motion for a new trial, which was granted by the court in the following order:

"It is now hereby ordered, that the verdict heretofore rendered and returned by the jury impaneled in said cause and

¹Reported in 141 Pac. 1034.

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Opinion Per MORRIS, J.

before whom said cause was tried, shall be and hereby is, vacated and set aside, and a new trial of said cause granted, unless the defendant, city of North Yakima, shall within twenty days from the date hereof, file in this court its consent in writing that judgment shall be entered against it in the above entitled cause in favor of the plaintiff for the sum of \$700 and costs of said action."

From this order, the defendant has appealed.

Our statute, Rem. & Bal. Code, § 399 (P. C. 81 § 729), provides for the granting of a new trial when the damages awarded are "excessive or inadequate, appearing to have been given under the influence of passion and prejudice." Under our practice, the jury, in the first instance, is to determine the amount of damages to be awarded in case of a recovery. But it is equally true that, when, in the judgment of the trial court, the jury has failed in its whole duty in this regard and has returned a verdict in an excessive or inadequate amount, it is the duty of the trial court to correct such verdict. In the performance of such duty, the trial court exercises a judicial discretion which this court will not interfere with unless it is apparent that there has been an abuse of such discretion. Such is so universally the law as to make its statement sufficiently authoritative. It is equally clear that, in exercising this judicial discretion, it is immaterial whether the verdict is too large or too small. "The one verdict stands upon no higher plane in law than the other." *Aboltin v. Heney*, 62 Wash. 65, 113 Pac. 245. The only question, then, for us to determine is, Did the lower court, in granting the order complained of, abuse its judicial discretion? We can find no evidence that it did, not being able to say that the record presents no evidence of a pecuniary loss. Neither is appellant prejudiced by the condition imposed in the order that it might avoid a new trial by consenting to the entry of the judgment in the sum of \$700. So far as the latter feature is concerned, it is inconsequential; appellant can reject or accept the condition according to

its best judgment. *Marsh v. Minneapolis Brewing Co.*, 92 Minn. 182, 99 N. W. 680; *Ford v. Minneapolis St. R. Co.*, 98 Minn. 96, 107 N. W. 817.

The judgment is affirmed.

CROW, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 11784. Department One. July 22, 1914.]

ATHELTON U. HERRETT, *Appellant*, v. ALICE HERRETT,
Respondent.¹

DIVORCE—CUSTODY OF CHILDREN—DECREE—MODIFICATION—EVIDENCE—SUFFICIENCY. The modification of a decree of divorce so that the defendant, who had remarried, should not be allowed to visit or entertain his children in the presence of his wife, is error, where the only evidence to warrant it was that the wife had given each of the children a new penny and baked cookies and a birthday cake for them, and there were no aspersions against her character or home.

SAME—CUSTODY OF CHILDREN—DECREE—VIOLATION. A divorced wife violates the spirit of the decree permitting the children to visit the father, where she prejudiced them against him because of his remarriage; and should be required to cease doing so.

DIVORCE—ALIMONY—ALLOWANCE. The allowance of alimony where the right is established, should be measured by the necessities of the parties.

SAME—ALIMONY—MODIFICATION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the increase of a \$75 monthly payment of alimony, where it appears that the defendant had paid alimony due, furnished plaintiff with free house rent and groceries, that his business had decreased since the divorce, and he had remarried, and a salary of \$100 a month had been increased to only \$125 a month.

SAME—ALIMONY—DECREE—VALUE OF PROPERTY—CONCLUSIVENESS. In a divorce action, a finding as to the value of the property is not conclusive upon a subsequent motion to modify the decree for alimony.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 8, 1913, upon findings

¹Reported in 141 Pac. 1158.

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in favor of the defendant, modifying a decree of divorce, after a hearing on the merits. Reversed.

Moore, Wardall, Wardall & Martin, for appellant.

Henry W. Pennock, for respondent.

CHADWICK, J.—This case has been before this court, and is reported in 60 Wash. 607, 111 Pac. 867. The decree formerly entered provided that the children of the parties should be allowed to visit the father at stated intervals, and that the father should have the right to the sole care and custody of the children for a period of one month in the summer time. In the fall of 1912, the father remarried. After the children had visited the father once or twice in his home and his place of business, the mother refused to allow them to visit him any more unless he would agree to entertain them away from his home and out of the presence of his wife. When the time came for the father to take the children for the summer, the respondent positively refused to allow him to have the children unless he would agree with her that he would not allow them to meet his present wife. He thereupon asked that the respondent be cited for contempt. This was met by a countermovement on the part of the respondent, who filed a motion asking for an increased allowance of alimony. The two motions or rules coming on for hearing at the same time, the court found, after taking the evidence of the parties, that the conditions had so changed that a modification of the former decree was warranted, as it had been provided therein that it might be, from time to time, as the court might find it necessary so to do. The court found that hereafter said children "may not be entertained by or in the presence or company of the plaintiff's present wife," and further found, in so far as the original decree refers to the summer vacation, that it should be qualified with the following proviso: "provided the present wife of the plaintiff shall not be in the company of said children nor entertain them during any part of said period." The

original decree was further modified by increasing the allowance of alimony from \$75 to \$90 per month.

The only evidence, if it can be said that the testimony rises to the dignity of evidence, warranting a modification of the decree, in so far as it pertains to the children, is that the present wife, on one occasion, gave two of the smaller children each a bright new penny, and that she baked some cookies which were given to them, either by her or by her husband, and had also baked a birthday cake for one of the little ones. This so offended respondent that she sought the advice of her former counsel, who told her that she "did not have to stand it." It was then that she refused to allow the children to visit the father.

The present wife is a woman of good character; at one time she had been employed in the home of the parties to this action. There is not one word of aspersion against her character or against the home she maintains. Indeed, it seems to us that the things she did were no more than the performance of a duty she owed to her husband and to his children. We find no disposition or purpose to wean the affection of the children away from the respondent. It is not contended that she has ever, at any time, by word or act, sought to violate any rule of propriety or the legal rights of the parties concerned. The respondent at all times thought well of appellant's present wife while she was employed in their home. She was, according to her own testimony, the best girl she ever had. There is no suggestion in the record that she was instrumental in bringing about the trouble culminating in the divorce, or that she kept company in any way with appellant until a short time before their marriage. So far as the record goes, the present wife was just human. Had she been otherwise, respondent might have cause to complain. In contrast with the wife's conduct, it is very apparent to us that the respondent has not kept proper faith with her husband, who, notwithstanding the troubles they may have had, has an equal interest, and, so far as the record shows, an equal

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affection for the children. One of the little ones was a witness, and the instillation of prejudice is very apparent from her testimony.

“Q. You used to be very fond of your papa? A. Yes, sir.
Q. Would you say that you have treated your papa with the same affection during these last six months or year that you formerly did? A. No, I don't. Q. Why should you treat your father differently? A. He went and ruined my mother and he married another lady. Q. That is the reason you don't love your papa? A. Yes, sir.”

Respondent, testifying, says that one of the smaller children had told her that he would never have eaten the cookies, “if he had known they came from her” (meaning the present wife). Such sentiments, if they were expressed by the child, who was of tender years, were not spontaneous or the natural expression of a child. Respondent has violated the spirit of the decree, for whatever her grievances may be, the children are as much entitled to love and be loved by the father as by the mother.

To hold, under the facts of this case, that a parent is to be deprived of the society of his children, would be to hold that divorced people cannot remarry. Whatever individual opinion may be with reference to this vexed problem, our law is framed upon the theory that marriage is to be encouraged, and that remarriage is not only lawful but is consistent with a sound public policy.

In so far as the court has modified the former decree touching the right of visitation, the judgment will be reversed, with direction to the court to direct the appellant to cease her manifest purpose to turn the children against the father and against his unoffending wife. Coming now to the question of the increase of alimony, appellant undertook to show that his business was in such shape that the increase was an unwarranted hardship. He offered testimony that, in our judgment, might well have been considered by the court. When husband and wife have come to the divorce court and meas-

ured their shattered bonds in money, the law will not longer treat the relation as one of sentiment. It must be measured by the necessities of the one party and the ability of the other to meet that necessity (*Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653); assuming, of course, that the one receiving the alimony is entitled to demand it, under all the attending facts and circumstances.

We think, too, that the court was in error when it directed the payment of a greater sum than \$75 per month. The testimony shows that appellant's business was in a bad way; that he had had to give up one of his places of business and had combined his business with that of his brother. It shows that he has paid the \$75 per month to his former wife; that he has furnished her with all her provisions and that she had her house rent free. This testimony is uncontradicted. In fact, an offer to prove the present condition of his business by the books of the company he is connected with was rejected upon the objection of respondent's counsel. The only ground upon which the order for the increased amount can be sustained is that, at the time the divorce was entered, the appellant said he would be willing to pay more alimony if he were able to do so, and it appears by the record that he is receiving at this time a salary of \$125 a month instead of \$100, the amount he received at the time the former decree was entered. Now, if there is no reason in the law, there is no reason for the law's existence. If respondent, under the circumstances, cannot live on \$75 a month, with free house rent and provisions in the way of fruit and vegetables and other commodities handled by commission houses, then it is certain that appellant and his present wife cannot live on \$35 per month, out of which house rent must be paid. The testimony shows, and it is uncontradicted, that they are living in a most modest way.

It may be said that the case falls within the rule of *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974, and that a husband is bound to pay alimony to a

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former wife, notwithstanding the fact that he has remarried. We do not doubt this proposition, but this court has never intended to go so far as to hold that a divorced man or woman has no right to remarry, or that, if he does, all his earnings must go to the first wife. The *Brown* case does not deny the right of the court to measure the several obligations of the husband in a direct proceeding.

The law recognizes marriage as a civil contract founded on public policy, and encourages it in the interest of morality. If, then, a divorced husband remarries, he owes a duty to his present wife as well as to the former relation that the law must recognize if it is consistent. While the first wife may have first consideration and her necessities will not be unreasonably curtailed, or her wants ignored, neither will the necessities or wants of the second wife be disregarded. The court should and will make such adjustment as the relative necessities of the parties demand and the ability of the husband will warrant. From the record before us, the former order is more consistent with right and reason than is the one appealed from.

Our attention is called to the former opinion of this court wherein it is said that the testimony shows that the property of the parties to that action was worth \$30,000. The testimony before us does not show any such value. Such findings are not conclusive, and courts will, from time to time, adjust orders of this kind to meet present circumstances. *Croft v. Croft*, 77 Wash. 620, 138 Pac. 6; 14 Cyc. 786.

The orders of the lower court are reversed. The case is remanded with directions to reinstate the former decree.

GOSE, MAIN, and ELLIS, JJ., concur.

[No. 11920. Department Two. July 22, 1914.]

REPETTO AURELIO, *Respondent*, v. PUGET SOUND ELECTRIC
RAILWAY, *Appellant*.¹

RAILROADS—NEGLIGENCE—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of a motorman of an interurban train in colliding with a load of wood at a private farm crossing, and the contributory negligence of the driver of the team, are questions for the jury, where there was evidence that the train was running at the rate of fifty miles an hour when the motorman first saw the horses coming into view up a steep grade, about ten feet distant from the track, he being able to see the team before the driver could see the train, that, before reaching the foot of the grade, the driver went ahead, and with a view of the track for about 2,500 feet, could not see or hear any train, and at once started to rush the team across, and looking a second time, when his horses had about crossed, saw a car approaching from five to six hundred feet away, that the train caught the rear wheels of the wagon and stopped after running about 300 feet, and could have been brought to a stop within 800 to 1,000 feet if running at 50 miles per hour.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 1, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a collision with an interurban train. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Frank S. Griffith, for respondent.

MORRIS, J.—Respondent was slightly injured in a collision between one of appellant's interurban trains and a wagon upon which he was riding. Two grounds of negligence were alleged, excessive speed and negligent operation of the train. Respondent obtained a judgment for \$625, and the appeal urges insufficiency of the evidence to sustain it, with contributory negligence of respondent.

¹Reported in 141 Pac. 1030.

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The jury having resolved all questions of fact in respondent's favor, the record must be read most strongly against appellant's contention. So reading it, these facts appear: Near Cardmore, the appellant maintains a private crossing over the lands of Peter Cerini. This crossing is cut off from the private way of which it is a part by gates, the gate on the east side being forty-six feet distant from the east or north-bound track. The tracks are upon an embankment, so that, in crossing from the east, the tracks are approached upon a "heavy grade," the extent of the grade not being disclosed except as above. Approximately 2,500 feet south of this crossing, the railway crosses the Duwamish river, and between the bridge and the crossing, the tracks curve around a bluff, so that, while the crossing is in view from the bridge, one driving over it from the east would have a somewhat obstructed view to the south, opening up as the tracks were approached. The extent of this view to the south from the eastern gate and the greater view as one approached the tracks is not shown by the evidence.

The respondent testifies that, on the day of the accident, he came to the eastern gate with a load of wood; that he stopped the team, opened the gate, and walked to the easterly rail of the crossing, looking in both directions for an approaching train; that he could then see the tracks to the south as far as the bridge over the river; that he looked and listened, but neither saw nor heard any approaching train; that he then went back to his wagon, climbed into his seat, untied the reins, released the brakes, and started the team for the crossing. His language follows: "When I got to the track, I looked again to see whether I could see any car coming. Then, as I had a heavy load and was afraid of getting stuck, I rushed my horses up to the track in order to cross it quick, and when I got in the middle of the track with the horses about—with the fore feet of the horses on the furthest track—on the furthest rail—I looked and I

could see a car coming." "It might have been five or six to eight hundred feet away." "Just peeping around the curve." On cross-examination, he says: "When I looked the second time, my team was standing with the fore feet of the horses on the first rail." The car struck the hind wheels of the wagon and came to a stop three hundred feet to the north of the crossing. The motorman says the train was running fifty miles an hour when he first saw the horses coming into view, about ten feet east of the track and between four and five hundred feet distant. The distance within which this train could be stopped, as shown by the only testimony on that subject, was from eight hundred to one thousand feet.

It seems to us we have here two questions of fact for the jury: First, how far from the crossing was the train when the motorman first saw the team about to enter upon the crossing, and did he then use ordinary skill in attempting to avoid the collision? In answering this question it must be conceded that, because of the bluff and the curve, the motorman could see the horses before the respondent on the wagon could see the train. The second question is as to the contributory negligence of the respondent, taking into consideration what he knew as to the speed and frequency of trains over this crossing and what precautions he took to avoid the collision. If there was no testimony that respondent looked the second time before driving upon the track, we might hold that he was guilty of contributory negligence, as urged by appellant, under the rule of numerous cases from this and other courts. But there is some testimony that he did look. We quote again: "When I got to the track I looked again to see whether I could see any car coming. When I looked the second time, my team was standing with the fore feet of the horses on the first rail." We know the train was traveling 73 1-3 feet per second, but we do not know how fast the team was traveling, and so we cannot say whether, at the time of this second look, the train was within the danger zone.

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We only know that, when the horses reached the west track, the train was "five or six or eight hundred feet away." There is so much leeway in determining the various questions to be answered before we can find contributory negligence, as a matter of law, that we conclude that, under the circumstances here presented, they must be answered by the jury and not by us.

The judgment is affirmed.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11978. Department Two. July 22, 1914.]

FRANK J. FLAJOLE, *Appellant*, v. CARL H. SCHULZE, *as*
Executor etc., Respondent.¹

COVENANTS—AGAINST INCUMBRANCES—MUNICIPAL CORPORATIONS—LIEN OF ASSESSMENTS—WHEN ATTACHES. There is no breach of a covenant against incumbrances from the fact that, prior to conveyance, the city had instituted condemnation proceedings against the property conveyed for the purpose of paying the cost of widening and extending a street, under which a special assessment had been levied and confirmed by judgment of the court subsequent to the conveyance, since the lien of such assessment would not attach until the date of the judgment, under Rem. & Bal. Code, § 7797.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 31, 1914, in favor of the defendant upon an agreed statement of facts, in an action on contract, tried to the court. Affirmed.

Ryan & Desmond, for appellant.

Walter B. Beals, for respondent.

MORRIS, J.—This appeal comes to us upon an agreed statement of facts, from which it appears that, on the 8th day of May, 1913, the respondent conveyed to the appel-

¹Reported in 141 Pac. 1026.

lant, by warranty deed, certain property, located in the city of Seattle; that theretofore the city of Seattle had, under ordinance, authorized an improvement and created an assessment district including the property in question, for the condemnation of adjoining property, for the purpose of improving, widening and extending one of its streets; that, subsequent to the condemnation judgment and for the purpose of meeting the cost thereof, the board of eminent domain commissioners prepared an assessment roll, whereby a special assessment was levied upon the property in the sum of \$288. This assessment roll, coming on for hearing on April 13, 1918, was found by the court to be inequitable, and the roll was referred to the board of eminent domain commissioners for reassessment. Pursuant to this order, a new assessment roll was prepared, in which a special assessment was levied upon the property in the sum of \$456, which assessment roll was confirmed on July 7, 1918, and judgment of confirmation duly entered. The findings also recite that the property was benefited and enhanced in value by the improvement, and that the benefits accrued to the property prior to the date of the conveyance. Under these facts, the court dismissed the action, holding, in effect, that the assessment as last levied was not a breach of a covenant against incumbrances as contained in the deed, and that, as between the grantor and the grantee, the liability for the payment of the assessment must be borne by the grantee.

Appellant suggests that the lower court erred in this conclusion and that its judgment should be reversed, basing his contention upon *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879, where it was held that, in an action against a grantor upon a covenant against incumbrances, an assessment upon the property conveyed for a street improvement became an incumbrance upon the land at the time the benefits were conferred, and that, as between grantor and grantee, the liability would be determined as of that time. A similar

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question was before us in *Knowles v. Temple*, 49 Wash. 595, 96 Pac. 1. Referring to § 1 of the act of 1901, relating to special assessments for local improvements, Rem. & Bal. Code, § 7531, providing that such assessments shall be a lien upon the property assessed from the time the assessment roll shall be placed in the hands of the officer authorized by law to collect them, we then held that, as between grantor and grantee, the local improvement assessment did not become a lien so as to constitute a breach of covenant against incumbrances until the assessment roll was placed in the hands of the city treasurer for collection. The reason for the rule there announced was that, when the legislature had declared that the lien should attach at a given time, as it had in the act of 1901, any attempt on the part of the courts to fix a different time would be judicial legislation. Referring to *Green v. Tidball*, it was said that the doctrine there announced could not be extended, (1) because it ignored the provision of the statute fixing the different date, and (2) because the rule itself was open to serious objection. Such language, joined in by the judge who wrote the opinion in *Green v. Tidball*, can be read in only one way, and that is that the court no longer regarded *Green v. Tidball* as authoritative. Our present investigation convinces us that *Knowles v. Temple* announces the better rule, and that it should be followed. It substitutes certainty for uncertainty, and looks to a record rather than to parol evidence to discover when, as between grantor and grantee, liability would be determined, and such time becomes as fixed and definite as the statutory time for determining the lien of general taxes. The incumbrance complained of in this case was not a local improvement assessment of the same character as that complained of in *Knowles v. Temple*, and hence is not governed by the same statute. This incumbrance was a special assessment made by the board of eminent domain commissioners for the purpose of paying the cost of widening and extending a pub-

lic street, and is governed by Laws of 1907, page 316. Section 30 (p. 328) of that act, Rem. & Bal. Code, § 7797 (P. C. 171 § 89), provides that:

“The judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land or other property assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken. Such judgment shall be a lien upon the property assessed from the date thereof until payment shall be made.”

This statute brings the case under the rule of *Knowles v. Temple*, and the reasoning sustaining the decision in that case sustains our conclusion in this case, that the lien liability, as between appellant and respondent, must be determined as of the date of the judgment confirming the assessment roll. In addition to the authorities cited in *Knowles v. Temple*, the following are in point. *Feder v. Rosenthal*, 62 Misc. Rep. 610, 116 N. Y. Supp. 2; *Harper v. Dowdney*, 113 N. Y. 644, 21 N. E. 63; *Tull v. Royston*, 30 Kan. 617, 2 Pac. 866.

For these reasons, the judgment is affirmed.

CROW, C. J., PARKER, and MOUNT, JJ., concur.

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[No. 12066. Department One. July 22, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER MILLER,
Appellant.¹

APPEAL AND ERROR—NOTICE—EFFECT OF SECOND NOTICE. The filing of a notice of appeal within due time operates as an abandonment of a prior notice, and hence all subsequent proceedings based upon such notice are fixed as to time of filing by the date of the second notice.

SAME—PROCEEDINGS TO PERFECT—FILING FEE—FAILURE TO PAY—DISMISSAL. The payment of the filing fee on appeal subsequent to a motion to dismiss on the ground of nonpayment, but prior to the hearing of the motion, cures the defect, under Rem. & Bal. Code, § 1734, providing that, when any such motion does not go to the substance of the appeal, or to the right of appeal, the court may, in its discretion, deny the motion on such terms as may be just.

Motion to dismiss an appeal from a judgment of the superior court for King county, Ronald, J., entered October 10, 1912, upon a trial and conviction of burglary. Denied.

Joseph M. Glasgow, for appellant.

John F. Murphy and *Everett C. Ellis* (*Herbert B. Butler*, on the brief), for respondent.

CHADWICK, J.—The defendant was convicted of the crime of burglary in the second degree. Judgment was entered on the 24th day of September, at which time he gave notice of appeal to the supreme court. On December 22, he filed another notice of appeal and served it upon the prosecuting attorney. On March 19, the brief of appellant and his abstract of record were filed in the superior court. On March 23, the record was transmitted to this court. On the 8th day of May the state moved to dismiss the appeal on the ground that no transcript or brief on the part of the appellant had been filed herein, and that the time to do so has expired. This motion is predicated on the assumption that the time for ap-

¹Reported in 141 Pac. 1139.

peal began to run on the 24th day of September. The motion would be well taken but for the fact that appellant gave the notice of appeal on December 22d. This he had a right to do, and having done so, his time for perfecting his appeal ran from that date. The first notice will be treated as if abandoned, under the following authorities: *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077; *Callahan v. Houghton*, 2 Wash. 539, 27 Pac. 175; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Tacoma Lumber & Mfg. Co. v. Wolff*, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462; *State ex rel. Baldwin v. Seavey*, 7 Wash. 562, 35 Pac. 389; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041; *Embree v. McLennan*, 18 Wash. 651, 52 Pac. 241; *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 902; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95; *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763.

A further ground of motion is urged in that, at the time the motion was made, the appellant had not paid his filing fee in this court. The fee was paid before the motion was brought on for hearing. It has been the practice of this court in such cases to overrule motions to dismiss when made for that reason, when, at the time of the hearing, the omission has been cured, or when, in the judgment of the court, the case should be heard and terms may be imposed to meet the consequences of the delay. Nonpayment of a docket fee is not made a non-conditional cause for the dismissal of an appeal, nor will it deprive the court of the discretion put upon it by the statute.

"If the supreme court on the hearing of any such motion or motions shall find the grounds or any part thereof alleged, for the same, to be well taken and true in effect, the court may grant the same in whole or in part, but when any such motion does not go to the substance of the appeal, or to the right of appeal, and the court shall be of the opinion that the moving party can be compensated in costs, or by the imposition of other terms for any delay of the appellant which is made the ground of any such motion (except a failure to take the appeal within the time limited by law) the

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court, in its discretion, may deny the motion on such terms as may be just." Rem. & Bal. Code, § 1734 (P. C. 81 § 1221).

The motion to dismiss the appeal is denied.

Crow, C. J., MAIN, and ELLIS, JJ., concur.

[No. 11095. Department One. July 22, 1914.]

PACIFIC WAREHOUSE COMPANY, *Respondent*, v. McKENZIE-HUNT PAPER COMPANY, *Appellant*.¹

LANDLORD AND TENANT—LEASE—TERMINATION—ELECTION TO EXERCISE OPTION—REASONABLE TIME. Under a written agreement constituting a part of the same transaction as the execution of a lease of premises for the term of five years, whereby the lessor agreed to construct an overhead walk to the building if permit therefor could be obtained from the city within twelve months, and, if not obtained, the lessee should have the option to cancel the lease or amend same as mutually agreeable, where the lessee continues in possession for some months paying the rental stipulated by the lease, after notice from the lessor to forthwith exercise the option for terminating the lease because of failure to obtain the permit, the delay of the lessee for a period of six months to exercise his election is such an unreasonable time as to constitute a waiver of the right.

Appeal from a judgment of the superior court for King county, W. B. Stratton, Esq., judge *pro tempore*, entered September 23, 1912, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Trefethen & Grinstead, for appellant.

Preston & Thorgrimson, for respondent.

Crow, C. J.—Action by Pacific Warehouse Company, a corporation, against McKenzie-Hunt Paper Company, a corporation, to recover rent alleged to be due upon a written lease. From a judgment in plaintiff's favor, the defendant has appealed.

¹Reported in 141 Pac. 1147.

On April 25, 1910, respondent, in writing, leased to appellant, then known as McKenzie-White Paper Company, a portion of the Maritime building, in the city of Seattle, for the term of five years, at the monthly rental of \$340. On the same date, and as a part of the same transaction, respondent also executed and delivered to appellant the following written agreement:

"In consideration of One Dollar to us in hand paid, we hereby agree to make application to the City Council for a permit for an overhead walk connecting the present overhead walk on the south side of Marion street, and extending across said Marion street, to connect with the doorway on the second floor at the south side of the building, known as the Maritime building.

"We further agree to use all honorable means of securing said permit, and as soon as same is granted, we agree to construct said overhead walk as aforesaid.

"If said permit should not be granted, or said walk constructed within a period of twelve months from date hereof, permission is given McKenzie-White Paper Company, at their option, to cancel the lease for part of the second floor and basement of said Maritime building made with them of even date herewith, or to amend same in such manner as shall be mutually agreeable to us, and to said McKenzie-White Paper Company.

"Dated this 25th day of April, 1910.

"Pacific Warehouse Co.,

"By E. Cardin, President."

It is conceded that respondent made every reasonable effort to obtain the necessary permit from the city, but failed to do so. There is evidence that, by mutual consent, the time for obtaining the permit was extended until about July 1, 1911, as it then seemed probable that the permit could be obtained. The permit was finally refused by the city authorities, with the result that the overhead walk could not be constructed. Thereafter, and on July 5, 1911, respondent orally notified appellant that the permit could not be obtained, and requested appellant to exercise its option. On

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July 27, 1911, respondent served upon appellant the following written notice:

"Seattle, Wash., July 27, 1911.

"McKenzie-Hunt Paper Co., Seattle, Washington.

"Gentlemen: Referring to the lease between ourselves and you, executed April 25, 1910, and our communication to you upon the same date in regard to overhead walk:

"We hereby notify you that the city authorities have refused us the permit in said communication referred to.

"We hereby require you to exercise the option granted to you in said communication of terminating said lease, and to exercise said option forthwith. It is not, and never has been, our intention that the option therein referred to could be exercised by you at any time during the term of the lease, but that you were to exercise the option forthwith upon the happening of the contingency. We have no idea of being bound by a lease to you and you not being bound on the lease to us.

"Unless we receive a written communication from you within forty-eight hours from this date, saying definitely that you choose to terminate the lease or choose to continue the lease, we shall assume that your choice is to continue the lease.

"Yours respectfully,

"Pacific Warehouse Co.,

"Per E. Cardin, Pres."

There is some evidence to the effect that, about the same date, July 27, 1911, respondent leased to appellant, at the rental of \$40 per month, additional floor space, which was then reasonably worth \$100 per month. Respondent claims that this was done in consideration of appellant's oral agreement to waive its option to terminate the principal lease. Appellant denies this alleged oral agreement, claiming the lease of the additional floor space was an independent transaction having no relation whatever to appellant's option. In any event, appellant failed to notify respondent of its exercise of the option at any time prior to January 16, 1912, but continued in possession, paying rent according to the terms of the principal lease. On January 16, 1912, appellant, in writing, notified respondent that it then elected to cancel the lease, and that it would vacate the premises on February 29,

1912. On January 19, 1912, respondent, in writing, notified appellant that respondent denied appellant's right to then exercise the option, and that respondent would hold appellant for the rent during the remainder of the five year term. On February 29, 1912, appellant vacated the premises, and surrendered the keys to respondent's manager. There was evidence introduced by appellant tending to show that, at all times from July 17, 1911, until January 16, 1912, it was making an effort to consolidate with some other firm, or to close its business and sell its stock; that it succeeded in making a sale about January 16, 1912; and that it then had no further use for the premises after February 29, 1912. There was no evidence showing the extent of appellant's business or the value of its stock.

Several contentions are made by the respective parties, but the controlling question before us is whether appellant exercised its option to terminate the lease, and gave respondent notice of its election, within a reasonable time after respondent informed it that a permit from the city could not be obtained. Appellant insists that the wording of the written stipulation executed with the lease is only susceptible of the construction that appellant would be entitled to exercise its option at any time during the life of the lease, or at least within a reasonable time, and that it did elect to cancel the lease within a reasonable time. Respondent contends, and the trial court held, that it was appellant's duty to exercise the option within a reasonable time after being notified that respondent could not obtain a permit from the city, and that appellant neglected to do so.

It seems to us that respondent's contention must be sustained, even though the forty-eight hours fixed by respondent be held less than a reasonable time. In many states, statutes have been enacted which, in substance, provide that, when a leased building, without default or neglect upon the part of a lessee, is so injured by fire or by any other unavoidable cause as to render it unfit for occupancy, the lessee

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shall not be liable thereafter for rent to the lessor. Such statutes ordinarily provide that, upon the happening of such a contingency, possession of the premises shall be surrendered to the lessor. In passing upon such a statute, the supreme court of Ohio, in *Gay v. Davey*, 47 Ohio St. 396, 25 N. E. 425, said:

"The obvious design of this statutory provision is, to relieve from hardship the tenant who has inadvertently neglected to protect himself by express covenant in his lease, against the necessity of paying rent, after the leased premises have been destroyed by fire or other casualty. But, to secure the benefit of the statute, the tenant must surrender or yield up all that remains of the premises embraced in the lease, without any purpose or intention of resuming possession thereof. . . .

"In *Johnson v. Oppenheim*, 55 N. Y. 280, the court of appeals, in construing chapter 345 of the New York Laws of 1860, which is substantially the same as the statute of Ohio, *in pari materia*, say:

"The act provides that, upon the destruction or injury of leasehold buildings so that the same are untenable, the tenant shall not be liable or bound to pay rent, and that he may thereupon quit and surrender the possession of the premises. The tenancy is not made absolutely to cease, except at the option of the tenant. He is relieved from his obligation, if he chooses to avail himself of the provisions of the act, or he may perform the covenants of his lease and retain the benefit of it; but he cannot have the benefit of the law, and, at the same time, repudiate its obligations. If he elects absolute solution from its obligations, the act, by necessary implication, imposes as a condition the surrender of the premises."

See, also, *Roach v. Peterson*, 47 Minn. 462, 50 N. W. 601; *Flint v. Sweeney*, 49 Minn. 509, 52 N. W. 136; *Peticolas v. Thomas*, 9 Tex. Civ. App. 442, 29 S. W. 166. Mr. Underhill, in vol. 2 of his work on Landlord and Tenant, commenting on the rights and duties of a lessee under such statutes, at § 791, says:

"A statute releasing a tenant from his liability for the payment of rent in case the premises are destroyed by fire or

other casualty does not terminate the lease where the tenant remains in possession. A tenant who claims the benefit of the statute must, within a reasonable time after the premises become unfit for occupation, elect whether he will move out or whether he will remain. He must move out promptly and if he shall remain in possession he waives his exemption under the statute. He cannot retain possession and, at the same time refuse to pay the rent. If he has once elected to remain he cannot subsequently change his intention and surrender the premises. This is the rule even where the statute is silent as to the necessity of a surrender by the tenant."

The stipulation upon which the appellant relies provided that, if a permit from the city should not be obtained or the walk should not be constructed within twelve months from the date of the lease, then appellant, at its option, might cancel the lease, or amend the same in a manner agreeable to the parties. It would seem that the doctrine of the cases and authorities above cited, although announced in construing statutes, should be applied to the stipulation now under consideration. We therefore conclude that appellant was required to exercise the option within a reasonable time, and that, having failed so to do, it must now be held to have elected a continuance of the tenancy created by the lease. It is manifest from the facts stated that the appellant did not exercise the option, or notify respondent of its election within a reasonable time. It is also apparent that appellant first attempted to surrender the premises and cancel the lease after it had disposed of its stock of goods, ceased to do business, and had no further use for the leasehold estate. Having failed to make its election in a reasonable time, appellant's liability for the payment of rent under the lease continued.

It is shown that respondent made every reasonable effort to obtain a tenant for the building and thereby diminish appellant's liability; that it did receive a small amount of rental for which the trial court gave appellant credit. After giving this credit, judgment was entered for the amount due as

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shown by the supplemental complaint. The evidence sustains the findings made, which in turn sustain the judgment. The judgment is affirmed.

MAIN, ELLIS, and GOSE, JJ., concur.

[No. 11539. Department One. July 22, 1914.]

WILLIAM W. WARDELL, *Respondent*, v. COMMERCIAL WATERWAY DISTRICT NO. 1, OF KING COUNTY, *et al.*, *Appellants*.¹

NAVIGABLE WATERS—LANDS UNDER WATER—CONVEYANCES—CONSTRUCTION. After the title to the bed of a tidal stream has passed from the state into private ownership, a conveyance by an upland proprietor, describing the land as bounded by such stream, and making no reservation of the portion covered by water, passes title to the grantor's interests as far as the grantor owns under the waters of such stream.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—RIGHTS. The rights of a subsequent purchaser derailing title from a prior grantor and claiming under intermediate conveyances are measured by the language used in the deeds, and not controlled by facts and circumstances surrounding the conveyance passing from such prior grantor to his grantees.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 23, 1913, upon findings in favor of the plaintiff, in an action to quiet title. Reversed.

Shorett, McLaren & Shorett, Peters & Powell, and *Saunders & Nelson*, for appellants.

John G. Barnes, for respondent.

MAIN, J.—The purpose of this action was to quiet the title to two small tracts of land lying above and along the west meander line of the Duwamish river. The defendant Commercial Waterway District No. 1 claims to be the owner of these lands, derailing title from the plaintiff. August Sandgren and wife and Anna Matson became parties to the

¹Reported in 141 Pac. 1045.

action by intervention. The lands in controversy are a part of lot 7, in sec. 19, twp. 24 N., R. 4 E. W. M., in King county, Washington.

The meander line on the west side of the Duwamish river constitutes the east boundary of lot 7. In front of a portion of lot 7, the meander line as established by the United States government surveyors is below the line of ordinary high tide.

On February 27, 1882, the plaintiff, Wardell, acquired title to all of lot 7. On February 11, 1896, Wardell sold and conveyed to one Matson a portion of the lot consisting of ten acres, more or less, described by metes and bounds. The call in this deed for the south boundary of the tract extended "to the Duwamish river, thence north 0 degrees, 58 minutes east, 730 chains, along said river." On October 20, 1896, Wardell conveyed to August Sandgren a portion of lot 7, containing five acres, more or less, and describing the portion sold by metes and bounds. The call for the south boundary in this deed extends "to the Duwamish river, thence north 0 degrees, 45 minutes east 3.79 chains." During the year 1912, the waterway district received conveyances from Anna Matson, for herself and as administratrix of the estate of her deceased husband, and Sandgren and wife, for certain portions of the east side of the 10 and 5 acre tracts. Within these conveyances, was included the land lying below the line of ordinary high tide and above the meander line. The controversy is over the title to that strip of land or "water gore" lying above the meander line and below the line of ordinary high tide. This strip of land varied in width from 35 to 45 feet and amounted to a little less than three-fourths of an acre. When the Sandgren and Matson deeds were executed, the plaintiff's title extended to the meander line. The plaintiff claims that his deed to Sandgren and Matson conveyed only to the line of ordinary high tide. The Waterway District contends that those deeds conveyed title to the meander line, since Wardell's ownership extended that far into the

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river. The cause was tried to the court without a jury. Judgment was entered quieting the title in the plaintiff to the strip of land in controversy. From this judgment, the appeal is prosecuted.

The respondent opens his brief with a number of motions, calling in question the sufficiency of certain of the steps taken by the appellants in the prosecution of their appeal. Without reviewing these motions in detail, it may be said that an attentive consideration of them leads to the conclusion that each is without substantial merit.

Upon the merits, the principal question is the construction of the language, "to the Duwamish river," as used in the deeds of Wardell to Sandgren and Matson. Does this language fix the east boundary line of the tracts conveyed at the line of ordinary high tide, or that point in the river to which Wardell's title extended?

Two general propositions of law seem to be recognized by both the appellants and the respondent. One is, that when a private individual grants property belonging to him and bounds it generally by a natural stream, the presumption is that he does not intend to reserve any land between the upland and the stream, and the grant will carry the title to the grantee so far as the grantor owns, unless the shore land or bed of the stream be expressly reserved from the grant. The other is, that in those jurisdictions where the beds of navigable and tidal streams are in the state and not in the adjacent land proprietors, a conveyance of land fronting upon such streams, made by private owners while the title to the shore land or bed of the stream remains in the state, are not presumed to extend beyond the line of the private ownership.

The respondent claims that, since by, article 17, § 1 of the constitution, the state "asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and

lakes," the present case falls within the rule stated where the title to the shore land or bed of a stream is in the state, and that the presumption is that "to the Duwamish river," means only to the line of ordinary high tide. The appellants contend that this rule does not operate when the title to the shore land or the bed of a stream has passed out of the state and into private ownership.

The respondent cites and quotes an excerpt from a note prepared by Mr. Freeman in *Allen v. Weber*, 27 Am. St. 56, as sustaining his position. This note, however, when read in its entirety, states a doctrine contrary to that contended for by the respondent. After stating the general rule, that where the title to beds of navigable or tidal streams is in the state or sovereign and not in the adjacent land proprietors, a conveyance of land fronting upon such stream is presumed not to be intended to extend beyond the line of private ownership, which is generally at ordinary high water mark, it is said:

"When, however, it clearly appears that the bed of a navigable or tidal stream is not vested in the state or sovereign, but in some private proprietor, the presumptions ordinarily attending conveyances ceases to operate, and their place is taken by a contrary presumption, which is, that the grantor did not intend to reserve to himself the flats nor the land covered by water lying between the bank and the thread of the stream, and to thus shut off his grantee from ownership in the land underlying the water. In the multitude of decisions, it would, perhaps, be extreme to say that none can be found in conflict with the rule which we have stated, but our industry has not enabled us to discover any in conflict with it. On the contrary, in every instance in which we have seen the question decided, where it appeared that the grantor owned any part of the bed of the stream, whether navigable or tidal, or not, his conveyance has been held to extend to the thread of the stream, when he owned so far, and in other cases up to the line of his ownership, when it did not extend so far into the stream as its thread, unless it contained some words clearly reserving from the operation of his deed the land so owned by him. [Citing authorities]."

After the title to shore land or the bed of a stream has passed from the state into private ownership, there seems to be no reason why a conveyance by an upland proprietor of land, describing it as bounded by a certain stream, in the absence of a reservation, should not convey all the land which such proprietor owns, even to the thread of the stream, if he should own so far. In *Freeman v. Bellegarde*, 108 Cal. 179, 41 Pac. 289, 49 Am. St. 76, it is said:

"A private grant is to be interpreted in favor of the grantee, and, if the grantor is the owner of the monument or boundary designated in his grant, his conveyance will be held to extend to the middle line or central point of such monument or boundary. This rule is not changed by reason of the fact that a stream which is designated as the boundary is a tidal stream, if the grantor of the land is the owner of the bed of such stream. 'When riparian estates are conveyed the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters.' (Gould, Waters, sec. 195.) The title to the beds of tidal streams is ordinarily vested in the sovereign, and in such case a grant from the sovereign which is bounded by tidal waters will be construed to extend only to high-water mark. (*Long Beach Land etc. Co. v. Richardson*, 70 Cal. 206.) A grant from the sovereign is to be interpreted in favor of the grantor, contrary to the rule for interpreting grants between private individuals; but if, as in the present case, the sovereign has parted with the title to the land beneath the stream, a grant of the riparian tidal lands by the owner must receive the same construction as a grant by him of any other riparian lands."

What is meant by the call in the deeds "to the Duwamish river" seems to be substantially determined in the case of *Maynard v. Puget Sound Nat. Bank*, 24 Wash. 455, 64 Pac. 754. It was there held, that the words "to Duwamish Bay" are equivalent to the words, "Beginning at the sea;" and citing the case of *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 24 Atl. 429, 30 Am. St. 331, 17 L. R. A. 280, where the words "Beginning at the sea" were held to include shore land extending to low water mark.

The respondent, however, argues, that the facts and circumstances surrounding the sale and conveyance from Wardell to Sandgren and Matson show an intention to pass title only to the line of ordinary high tide. Whether these facts and circumstances, as shown by the record, are sufficient to overcome the presumption which attaches to the language of the conveyance as between the original parties, need not now be inquired into, and no opinion thereon will be expressed. The rights of the waterway district, derailing its title from Wardell, and claiming under conveyances from Sandgren and Matson, would be measured by the language used in the deeds, and not by the surrounding facts and circumstances. The evidence is insufficient to charge the waterway district with knowledge of anything dehors the deeds.

The judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

CROW, C. J., ELLIS, CHADWICK, and GOSE, JJ., concur.

[No. 11786. Department One. July 22, 1914.]

LUCY NICHOLSON, *as Executrix etc.*, Appellant, v.

T. T. KILBURY, *as Administrator etc.*,

*Respondent.*¹

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 1211, providing that "in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, . . . then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased person," excludes such a party from testifying to declarations made in his presence by the deceased to third persons, since the same fall within the spirit of the law, and the mischief of the old law, although the statute does not use the words "or in his presence."

¹Reported in 141 Pac. 1043.

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Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 6, 1913, dismissing an action to recover upon claims against the estate of a decedent, after a trial before the court and a jury. Affirmed.

Voorhees & Canfield and *C. E. H. Maloy*, for appellant.

Peacock & Ludden and *H. G. Kinzel*, for respondent.

CHADWICK, J.—The plaintiff claims an interest in property now held by defendant as administrator of the estate of Emma J. Kilbury, deceased. Plaintiff sought to prove her interest by testifying to conversations had by the decedent with third parties, but in her presence and hearing. The court rejected the evidence, and from a judgment in favor of the defendant, plaintiff has appealed.

The only question involved in this action is whether the testimony should have been received. Rem. & Bal. Code, § 1211 (P. C. 81 § 1027), reads as follows:

“No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility; provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years: Provided further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action.”

It will be observed that the statute does not use the words “or in his presence.”

The statutes of the several states are generally very similar. The question has been before the courts in the state of

New York many times, and the earlier construction was that such testimony is competent; but in the later case of *Griswold v. Hart*, 205 N. Y. 384, 98 N. E. 918, 42 L. R. A. (N. S.) 326, the cases so holding are overruled and it was held that such testimony is barred by the statute. It was held in the state of Georgia, in the case of *Ray v. Camp*, 110 Ga. 818, 36 S. E. 242, that such testimony is competent. Immediately following the announcement of that decision, the legislature passed an act which in terms extended the disqualification to a witness who undertook to testify to the statements of a deceased person made to another but in his presence. Acts 1900, p. 57. This statute is followed in the later case of *Wilder v. Wilder*, 138 Ga. 573, 75 S. E. 654. We cite these two instances to show the trend of modern opinion. This court has never been called upon to decide the question, and we are therefore at liberty to treat it with an open mind.

We believe that the later New York case is consistent with the spirit and policy of the law. The rule of exclusion is severely denounced by Wigmore in his work on Evidence, § 578; but notwithstanding his strictures, the statutes are in force and the policy of the legislative body is not to be denied—that is, that the temptation to testify to communications and transactions and to declarations made by a deceased person might be so strong upon a party in interest that it would be unwise to receive such testimony when the lips of his adversary are closed. If it be sound policy to deny the interested party the right to testify to a conversation made immediately to him, it would be equally unwise to permit that same party to testify to a conversation addressed to another in his presence, and it works no hardship, considering the purpose of the law, to compel the party seeking the benefit of such declaration to call the one to whom the communication was made as a witness. The color of interest is the thing that the law has undertaken to remove.

We agree with counsel that there is a presumption of com-

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petence when a witness is offered, but that presumption must be construed in the light of the statute defining the limit to which a witness may go. When so tested, it seems to us that the statute means that a party may not testify to the declarations of deceased persons when made to a third party in his presence. In other words, the statute means that a party in interest is not to make himself a vehicle to carry the words of his deceased adversary into the record of a contested proceeding.

Whether the policy voiced by the state is good or bad is something with which we have nothing to do. It is enough that it has been declared by the legislature, and it will not be denied that the mischief here complained of is the same mischief covered by the literal words of the statute. This being so, we think that it can be said that the present case falls within the statute under the doctrine of necessary implication; for truly, anything that is within the mischief of an old law is, or should be held to come, within the spirit of the new law, and should not be excluded unless for the want of apt words or an evident purpose to exclude it. There are sound reasons for the application of this rule in cases such as this. Abuses would surely follow; as for instance: The supreme court of Iowa, which has been more active in establishing what is called the general rule, than any other court, not excepting the courts of New York—for they have not always been consistent with themselves—has been forced to the logical sequence of its holdings, notwithstanding the illogical result and has held that a party can testify to a transaction between a co-party of his and the deceased. *Mayer v. Turley*, 60 Iowa 407, 14 N. W. 731; *Erusha v. Tomash*, 98 Iowa 510, 67 N. W. 390; *Powers v. Crandall*, 136 Iowa 659, 111 N. W. 1010.

Then, too, there are reasons occurring to us not noticed in the authorities the writer has read. A designing person—and the statute is drawn upon the theory that the temptation upon a survivor will be sufficient to break the back of hon-

esty—might say that a third party, not called as a witness or who has since died, was present and that the remark was addressed to the third party and not to him. The challenged witness would, in such event, actually become the trier of his own qualifications and the vice covered by the statute would run unchecked. The rule should not then be made to turn on the question, Who was the remark addressed to? but rather, Is it most likely that the words repeated are the words spoken by the deceased? In spirit the statute takes no account of who is addressed or who is the participant in a transaction, but it does concern itself with the interest or lack of interest of the one who repeats the words or details the transaction. A person may talk *to* one person and *at* another. We know that men cannot repeat their own conversations as they actually occurred, after a lapse of time, and the statute demands that a party should not be allowed to repeat the words of his adversary or give his version when the adversary cannot reply and counsel cannot cross-examine, having the deceased person's version of the transaction, if indeed it occurred at all, in mind. To quibble over the manner in which the condition sought to be restrained or avoided has been brought about is to sacrifice form to substance. To receive the evidence if a third party is present to whom the interested party *says* the remark was addressed, and to scourge it if the face of the speaker was turned toward the witness when the words were spoken, is a refinement, subtle, misleading and destructive of an evident policy. In *Griswold v. Hart*, *supra*, after a full consideration of its former decisions, the court says:

“I think we can consistently and logically enunciate but one of two rules—that of the earlier cases based on what is claimed to be a strict construction of the words of the statute, that a witness is disqualified from testifying only in a transaction or conversation in which he takes actual part, or the other rule, that whatever he derives from the personal presence of the deceased by the use of his senses is a communica-

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tion from the deceased to him within the meaning of the statute. . . .

"I appreciate that . . . many persons advocate the admission of interested witnesses to testify to all matters, whether with a deceased person or with others, leaving the credibility of the witnesses to be determined by the court or jury. Whatever may be said of this view it certainly is not the view which has been taken by the legislature, and of all rules a rule that permits an interested witness to testify to an act or statement by the deceased on which his rights depend, if he takes no part in either, but excludes him if he does, would seem about the worst. It is most easily evaded by the dishonest witness, while often fatal to the conscientious. Nor is the broad exclusion declared in the later cases of this court clearly an enlargement of the statute. Communication is not necessarily confined to conversations. Anything imparted by one to another is communicated by him, even disease. A personal communication, within the meaning of the section, was well defined by the supreme court in *Price v. Price* (33 Hun 69, 73), as 'any one which the surviving party claims to have received directly or indirectly from the deceased person, and which the deceased person if living could contradict or explain. Nor, in our judgment, is the mode of making the communication by the deceased to the survivor at all controlling.'"

We shall not go into the cases. They are collected in a very valuable monographic note in 29 L. R. A. (N. S.) 1179, and in a continued note in 42 L. R. A. (N. S.) 320. There is nothing in the case of *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819, that is contrary to our present holding, unless it be the words, "it would be going too far, on assumed propriety, to add a disqualification to a witness not specified in the statute."

Measuring the statute by its four corners, we think the witness offered in this case is met by a disqualification "specified" in the statute.

Affirmed.

Crow, C. J., MAIN, and ELLIS, JJ., concur.

[No. 11806. Department One. July 22, 1914.]

ELLEN DENTON, as *Administratrix etc.*, *Appellant*, v.

TILLIE SCHNEIDER, as *Executrix etc.*,

Respondent.¹

WILLS—CONSTRUCTION—TESTAMENTARY TRUST OF INCOME—TERMINATION—RIGHT TO REMAINDER. A will devising all a testator's estate in undivided halves to his son and daughter, share and share alike, subject to a trust disposing of the total income of all his real estate for the use and benefit of a specified minor child of his son and a specified minor child of his daughter equally, to be paid by the executor to the respective guardians of said minor children, share and share alike, the trust to terminate upon the attainment of the age of majority by the younger legatee or upon the death of both legatees before either attains the age of majority, and providing that, in the event of the death of his son's child before becoming of age, the other trust legatee should continue to receive his undivided one-half until the age of majority, without any provision being made as to the deceased legatee's share of the income, plainly shows the intent of the testator to create a trust for particular individuals and not for the benefit of two classes of persons, and consequently the trust as to the deceased child would lapse, and her share of the income vest in the devisees, and not survive to her father.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR DE BONIS NON—RIGHT TO SUE—STATUTES. Under Rem. & Bal. Code, §§ 1430, 1431, 1538, providing that, in the case of the removal or death of an executor or administrator, he or his representative shall account to his successor, that the succeeding administrator may proceed by law against any delinquent former executor or his personal representatives, and that any administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor or of any former administrator of the same estate, authority is conferred upon an administrator *de bonis non* to maintain an action against a former executor or his personal representatives for the conversion of the rents and profits coming into his hands.

JUDGMENTS—RES JUDICATA—MATTERS NOT DECIDED. The filing by a devisee of exceptions to the report of an executor showing that he had appropriated certain income to his own use, upon which no formal judgment was entered, the court approving the report with the intimation that the proper time to raise the objection was on

¹Reported in 142 Pac. 9.

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the final accounting, would not constitute *res judicata* in an action by the administratrix *de bonis non* for a conversion of the income.

EXECUTORS AND ADMINISTRATORS—CLAIMS—ESTOPPEL. The fact that an administratrix *de bonis non* had, from time to time since her appointment, made reports without including a claim against the former executor for money converted, would not estop her from suing his personal representatives for the conversion, as it was not properly an asset of the estate so long as the money was withheld or the will unconstrued.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 13, 1913, dismissing an action upon a rejected claim against an estate, after a trial to the court. Reversed.

Shorett, McLaren & Shorett (F. A. Gilman, of counsel), for appellant.

Bausman, Kelleher, Oldham & Goodale, for respondent.

ELLIS, J.—The plaintiff, as administratrix *de bonis non* of the estate of Daniel Schneider, deceased, brought this action against the executrix of the former executor of that estate for the sum of \$2,500, based upon a rejected claim against the estate of Fred M. Schneider, the former executor. On September 6, 1901, Daniel Schneider died, leaving a will, the clauses of which material here are as follows:

“Third, I hereby give, bequeath and devise to Fred M. Schneider, my son, of King county, Washington, and to Ellen Stull, my daughter, of the state of California, all my property, and estate, of every nature whatsoever, wheresoever situate, both real, personal and mixed, in undivided halves, share and share alike; subject, however, to the fulfillment of the uses and trusts hereinafter provided for.”

“Fifth: I hereby direct that my said executor shall receive all the rents, profits, issues and incomes of all of my said real estate, and that he shall use and dispose of the same for the use and benefit of Clarence Stull, aged eleven years, son of the said Ellen Stull, and also for the use and benefit of Freeda Schneider, aged five years, daughter of the said Fred M. Schneider, during the whole of the period until the said Freeda Schneider shall have attained the age of majority,

this trust to terminate at that date or when said Clarence Stull shall have attained the age of majority, in the event of the death of said Freeda Schneider prior to that time, in which event the said Clarence Stull shall continue to receive his undivided one-half of said rents, issues and profits of said real estate, until he shall have attained the age of majority; the trust hereby created shall also terminate in the event of the death of both said Clarence Stull and said Freeda Schneider before either of them shall have attained the age of majority; said rents, issues and profits to be divided equally, when received, and paid by my said executor to the respective guardians of the persons and estates of said minor children, share and share alike, as often as the same shall be received, but not oftener than once in each calendar month."

Fred M. Schneider and Ellen Stull were all of the children of Daniel Schneider. Fred M. Schneider was named as executor, qualified as such on September 17, 1901, and continued so to act until his death. He collected the income and paid one-half to Freeda Schneider and one-half to Clarence Stull, through their respective guardians, as directed by the will, until February, 1907, when Freeda Schneider died, leaving as her heirs at law her father, Fred M. Schneider, and her mother, Tillie Schneider, the defendant herein.

After Freeda's death, he continued to pay one-half of the income to Clarence Stull, and paid the other one-half to himself, claiming it in his own right. The amount which he so appropriated prior to his death was \$2,500. On September 14, 1908, he made a report, showing that he was so applying the income. Ellen Stull, now Ellen Denton, filed exceptions to this report, claiming that he had no right to apply any of the income of the property to his own use, and asking for his removal. At the hearing upon these exceptions, she abandoned the demand for the removal of Fred M. Schneider as executor. No formal judgment was ever entered on these objections, nor any formal decree made construing the will or adjudicating the rights of the beneficiaries thereunder, the court then intimating that, as the objections involved a

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construction of the will, the proper time to raise them was on the final accounting.

In May, 1911, Fred M. Schneider died, and Ellen Denton was appointed administratrix *de bonis non* with the will annexed, of the estate of Daniel Schneider, deceased. She qualified and has ever since acted in that capacity. There has been no final settlement and decree of distribution of the estate. Since her appointment, she has, from time to time, made reports, but in none of these has she included the claim here in question as an asset of the estate. On the death of Fred M. Schneider, his will was admitted to probate and the defendant, Tillie Schneider, was appointed executrix. Ellen Denton thereupon presented this claim on behalf of the estate of Daniel Schneider, deceased, for the sum of \$2,500 against the estate of Fred M. Schneider. The defendant, as executrix of that estate, refused to allow the claim, and this suit was instituted. The cause was tried to the court without a jury. The action was dismissed. The plaintiff appealed.

Two questions are presented: (a) Did the bequest of the income in trust to the use and benefit of Clarence Stull and Freeda Schneider lapse as to the share of Freeda Schneider on her death, and thereafter pass under the third clause of the will, or did it survive for the benefit of her father, Fred M. Schneider, during the life and minority of Clarence Stull? (b) Has the appellant, as administratrix *de bonis non*, such an interest as will enable her to maintain this action in that capacity?

(a) It is a universal rule that, in construing a will, the courts must seek for and give effect to the testator's intention, if lawful. *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86, 69 N. E. 283, 67 L. R. A. 146. The rule is also universal that the testator's intention must be sought first of all in the will itself and that the intention which controls is that which is positive and direct; not that which is negative or inferential. *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137; *McCullough v. Lauman*, 38 Wash. 227, 80 Pac. 441.

An examination of the will here involved leaves no doubt as to the testator's intention, no room for a resort to anything *aliunde* the will itself to determine that intention. By the third clause of the will, the entire estate was bequeathed and devised to the testator's son and daughter, Fred M. Schneider and Ellen Stull, "in undivided halves, share and share alike; subject, however, to the fulfillment of the uses and trusts hereinafter provided for." This language is unambiguous. Clearly, both halves were subject to the fulfillment of all trusts. This clause, standing alone, evinces no intention that the income of the separate halves is to be subjected to the fulfillment of any separate uses or trusts. If, therefore, any such intention is to be found in the will itself, or any ambiguity in the intention, it must be found in the fifth clause, defining the only uses and trusts provided for in the will. In that clause, we find the whole income bequeathed in trust to the use and benefit of Clarence Stull, aged eleven years, and Freeda Schneider, aged five years, to be divided equally between them, share and share alike, with express and particular provisions for every possible contingency which can, in any way, affect these two minor beneficiaries personally for whose benefit alone this trust is declared. It is declared that this use and benefit shall continue, first, during the whole period until Freeda shall have attained the age of majority; second, in case of Freeda's death before her majority, Clarence shall continue to receive his undivided one-half until he shall have attained his majority; third, the trust shall terminate in the event of the death of both Clarence and Freeda before either of them shall have attained the age of majority. These are all of the provisions creating the trust, defining the trust, continuing the trust, and terminating the trust. The intention is as clear as words can make it that the trust is for the benefit of these two minors only. The intention is also clear that the trust shall terminate absolutely as to the share of Freeda upon her death, since, with that contingency in his mind and under consideration, the testator did not provide

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for the survival of the trust as to her share upon her death, but provided for the continuance of the trust only as to the share of Clarence and made no provision whatever as to the disposition of her one-half of the income on the happening of that contingency, except the provision found in the third clause of the will which gives all of the estate in undivided halves, subject only to the trusts "provided for," to Fred M. Schneider and Ellen Stull. On the death of Freeda, but one trust was provided for. That trust was the trust in favor of Clarence, and the devise to Fred M. Schneider and Ellen Stull in the third clause of the will in its entirety was expressly subject to that trust to the same extent as it would have been to both trusts had Freeda survived, since it is so subjected by the same words. No ambiguity can be found either in the third clause or the fifth clause of the will, whether taken separately or in conjunction. Nor can we find any ambiguity in them or either of them when applied to the subject-matter. The third clause applies to the whole estate except as limited by the fifth clause. The fifth clause applies to the whole income except as limited by the death of Freeda. Neither is there any ambiguity when the terms of these two clauses are applied to the beneficiaries. All beneficiaries are named *by name*. What each shall receive is expressed *in terms*. Freeda shall receive one-half of the income until she attains her majority or sooner dies. Clarence shall receive one-half of the income until Freeda attains her majority, or, if she die before that time, then only until his own majority. Of the whole estate, Fred M. Schneider and Ellen Stull shall each receive an undivided one-half, subject to both trusts. If it were not for the relationship of all of the beneficiaries to the testator, a claim of ambiguity or that anything whatever was left by the will to implication would be palpably absurd. The intention of the testator is expressed in terms on every contingency.

The respondent seeks to raise an ambiguity and to create an inference contrary to the express terms of the will from

the bare circumstance of the relation of the beneficiaries to the testator and to each other. It is argued that, by the death of Freeda, her father, Fred M. Schneider, took her share of the income, either (1) as survivor of one of two classes into which the testator had divided the objects of his bounty, or (2) as Freeda's representative.

The first claim is answered by the simple fact that the testator did not divide the objects of his bounty into classes. Every gift made by the will was expressly to an individual *by name*. As held in *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354, the legatees being named as individuals and standing in different relations to the testator could not be regarded as taking as a class. The intention to create separate classes was not only not expressed, but was negatived by the failure to provide for any survivorship to any one of any bequest on the death of any beneficiary. With the contingency of Freeda's death presently in mind and specifically under consideration, the testator made no provision that the bequest to her should survive her death. In the recent case of *Peck v. Peck*, *supra*, the question here involved, and on a state of facts fully as indicative of the creation of classes as those found here, was discussed and resolved, on a careful review of the authorities, contrary to the respondent's contention here. In that case we said:

"Courts will not permit themselves to be enslaved by mere technical rules of construction, but there are certain broad canons of interpretation which have become so thoroughly established by judicial announcement that they may be said to have passed into the body of substantive, or at least definitive, law upon the subject, which the courts will not capriciously disregard.

"As defining a gift to a class, no rule has been more frequently announced, nor more universally adhered to than the following:

"In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions,

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the share of each being dependent for its amount upon the ultimate number.' *In re Kimberley's Estate*, 150 N. Y. 90, 44 N. E. 945.

" 'A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews;' but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons.' 1 Jarman, Wills (6th ed., Bigelow), p. 262.

"This rule is announced *in haec verba* as a determinative principle in each of the following decisions, in which the exact question here involved was presented and decided adversely to the contention of the appellants here: *In re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. 110; *In re Russell*, 168 N. Y. 169, 61 N. E. 166; *Herzog v. Title Guarantee & Trust Co.*, *supra*; *Dulaney v. Middleton*, 72 Md. 67, 19 Atl. 146. See, also, 30 Am. & Eng. Ency. Law (2d ed.), p. 718; 40 Cyc. 1473."

And again, we said:

"There is another general rule of construction which, under different forms of expression, has met an almost universal approval by the courts.

" 'Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class.' Page, Wills, § 543.

"See also, *In re Hittell's Estate*, 141 Cal. 432, 75 Pac. 53; *Kent v. Kent*, 106 Va. 199, 55 S. E. 564; *Moffett v. Elmen-dorf*, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. 529; *Frost v. Courtis*, 167 Mass. 251, 45 N. E. 687; *Dildine v. Dildine*, 32 N. J. Eq. 78, 80; *In re Russell*, and *In re Murphy's Estate*, *supra*; Rood, Wills, p. 317, § 479; Remsen, Wills, p. 93; 30 Am. & Eng. Ency. Law (2d ed.), 718."

Applying these rules to the third and fifth clauses of the will above quoted, it is evident that the gifts were not to classes collectively, but were distributive gifts to the individuals named. The number of persons was certain at the time of the gift, and the share which each was to take was definite and in no way dependent for its amount upon the number which might survive. Each beneficiary was named. The further description by reference to the relation of the several beneficiaries to the testator did not change the fact that the designation by name constituted each gift a distributive gift and not a gift to a class. The testator simply indicated his son, his daughter, his grandson and his granddaughter, each by name, as his devisees and legatees of definite gifts, indicating, incidentally, their relation to himself. The mention of the relationship cannot be held to overcome the express individuality of the gift. *Peck v. Peck, supra*; *Bill v. Payne, supra*.

The authorities cited by the respondent are not pertinent. In *Dove v. Johnson*, 141 Mass. 287, 5 N. E. 520, the gift in trust was "after taking out George's share quarterly, yearly or oftener, to all my daughters in equal shares." "And the issue of any deceased daughter shall take the mother's share." This was, of course, held a gift to the daughters as a class and a gift to the issue of any deceased daughter of her share as a sub-class. No other construction was possible. In *Hood v. Boardman*, 148 Mass. 330, 19 N. E. 379, though the three grandchildren were designated by name, there was an express provision that the income should be divided among them or go to the survivor or survivors until the youngest arrived at the age of thirty years. In the case before us, there was no provision whatever for the survivorship as to Freeda's share in case of her death. In *Anderson v. Parsons*, 4 Me. 486, the devise to two grandsons was construed as creating a common law joint tenancy and not an estate in common. The right of survivorship was accorded not because of the testator's intention, but because it was an incident of common law

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joint tenancies as distinguished from tenancies in common. In *Woolston v. Beck*, 34 N. J. Eq. 74, the testator gave the income of his farm to two daughters, S. and K. for life, S. to have two-thirds of the income and K. one-third, and after the death of the daughters, the farm to their children in fee in specified portions. S. died, leaving children. It was held that K. was entitled to only one-third of the income, the remaindermen to have the other two-thirds. This case supports the appellant's position here rather than that of the respondent. Fred M. Schneider and Ellen Stull were both the remaindermen, taking the entire estate subject only to the fulfillment of the trusts. On the lapse of one of the trusts by the death of the beneficiary, that part of the income passed to both remaindermen share and share alike, and not to one to the exclusion of the other.

The claim that Fred M. Schneider took Freeda's share of the income on her death as her representative is even less tenable. It is argued that the trust could not partially terminate at Freeda's death, but this overlooks the fact that there is no provision for any continuance of the trust after Freeda's death except the provision that Clarence Stull shall continue to receive his undivided one-half of the rents, issues and profits of the real estate until he shall attain the age of majority.

It is further suggested that the will must, if possible, be given effect so as to dispose of *all* of the testator's property; that since the law favors the vesting of estates, and presumes an intention on the testator's part to die intestate as to no part of his estate, therefore, the trust for Freeda's benefit survived to her father. There is no force in this claim, since the will by its express terms, leaves the testator intestate as to nothing or upon any contingency. The third clause of the will vested the entire estate (income and principal) in Fred M. Schneider and Ellen Stull in undivided halves, share and share alike, subject only to the trusts provided for. The very terms of the third clause prevented the supposed partial intestacy

on the lapse of the bequest in trust for Freeda Schneider. We can conceive of no reason for disregarding the express provisions of the third clause of the will vesting every part of the estate in order to create a situation invoking the doctrine against intestacy. We know of no authority permitting a disregard of express terms of a will in order to make room for the implication of terms not expressed. Moreover, even the failure to provide for the disposition of a lapsed legacy will not warrant the court in implying a provision avoiding intestacy where there is nothing in the words of the will raising such an implication. As said by the supreme court of errors of Connecticut, in *Bill v. Payne, supra*:

"It frequently happens that legatees die during the lifetime of the testator. The testatrix could have provided for such a contingency by giving it to the survivors, or to other parties. She did neither. There is, therefore, some presumption that she intended that the law should settle the matter."

The further contention that Fred M. Schneider took as heir at law of his daughter, Freeda, is wholly lacking in support. The provision for the minors was a bequest, not a devise. *McCullough v. Lauman, supra*. It was a provision for an income to each beneficiary of the trust to be paid from the whole income of the estate during his or her life, *and* minority. In such a case, no freehold passes to the beneficiary or annuitant; no interest in the land from which the income is derived; no estate of inheritance in anything. *De Haven v. Sherman*, 131 Ill. 115, 22 N. E. 711, 6 L. R. A. 745.

In *Stanwood v. Stanwood*, 179 Mass. 223, 60 N. E. 584, which is typical of the authorities cited by the respondent in this connection, the will created a fund to be held in trust expressly to continue for the term of twenty years, the trustee to pay the income to the named children of the testatrix, "and at the termination of said twenty years to divide the property, real and personal, held by the trustee . . . equally among my said children and their respective heirs

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and assigns." It was held that the children took not as a class with the right of survivorship, but a vested interest as tenants-in-common. The distinction from the case here lies in the fact that the trust was for twenty years and was for the benefit of the children "and their respective heirs and assigns." Comment is unnecessary. In nearly every case cited by the respondent, the declaration of trust contained words of inheritance.

In any view of the case, the will, by its express terms, gave to Fred M. Schneider and Ellen Stull, in undivided halves, all of the income or any part of it not used in the fulfillment of the trusts provided for, whether by reason of the partial or entire lapse of these trusts by reason of the death of either or both of the beneficiaries of the trusts. Any other construction would be to rewrite, rather than construe, the will.

(b) Can the administratrix *de bonis non* maintain this action? If she cannot the action must be dismissed. She sued only in that capacity. The question is a new one in this state and requires consideration at some length. It is squarely presented and must be met. Under the rule at common law, she could not, since at common law the administrator *de bonis non* was only entitled to recover from the personal representatives of a deceased former administrator or executor property remaining in specie, i. e., in the form in which it existed at the death of the deceased, and capable of identification as the property of the first deceased. *Reed v. Hume*, 25 Utah 248, 70 Pac. 998; *Parker v. Stevens*, 61 N. J. Eq. 163, 47 Atl. 573;

Originally the right to administer was a prerogative of the crown. This right was afterwards transferred to the church and exercised through the prelates. The prelates were accountable only to God and their own consciences. They could, at will, devote the goods of an intestate to pious uses. When, by reason of prelatical abuses, the right to administer was, by statute, transferred to the next of kin of

the deceased, the administration was still conducted according to ecclesiastical rules. The administrator was vested with title to the goods, subject to payment of debts of the deceased. He had, however, no right to dispose of such goods by will, since he held the title in right of the estate. Any part remaining in specie at his death was still the property of the estate of the deceased. Such property was, therefore, subject to administration by the succeeding administrator or executor *de bonis non* with will annexed. If the first administrator or executor wasted, lost, altered or converted the goods of the estate, such goods were considered as "administered," and no longer a part of the estate. The first administrator's accountability therefor was then a mere chose in action in favor of the creditors, legatees or distributees of the estate, who alone could sue to enforce it. The administrator or executor *de bonis non*, being entitled to the possession, for the purpose of administration, only of goods remaining in specie, could only sue for the recovery of goods so remaining. *State v. Rottaken*, 34 Ark. 144.

We have adverted to the ancient basis of this doctrine merely to show its extreme technicality and its apparent lack of applicability to present day conditions. Has this rule been changed by statute in this state? The sections of our statute which we deem directly pertinent are as follows, the citations being to section number of Rem. & Bal. Code:

"§ 1430. If any executor or administrator resign, or his letters be revoked, or he die, he or his representatives shall account for, pay, and deliver to his successor, or to the surviving or remaining executor or administrator, all money and property of every kind, and all rights, credits, deeds, evidences of debt, and papers of every kind of the deceased, at such time and in such manner as the court shall order on final settlement with such executor or administrator, or his legal representatives."

"§ 1431. The succeeding administrator, or remaining executor or administrator, may proceed by law against any delinquent former executor or administrator, or his personal

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representatives, or the sureties of either, or against any other person possessed of any part of the estate."

"§ 1538. Any administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor or of any former administrator of the same estate."

In *State v. Rottaken*, *supra*, chiefly relied upon by the respondent as construing statutes (Gautt's Digest, §§ 44, 45) very like our §§ 1430 and 1431, above quoted, the supreme court of Arkansas held that an administrator *de bonis non* could not maintain an action against a former administrator or executor of the same estate for waste or conversion, that the statute did not supersede the common law rule and that the action could only be maintained by the creditors, legatees or distributees. This, however, as shown by the opinion, was largely because another section of the statutes of that state (Gautt's Digest, § 191) authorized only "a legatee, distributee, creditor, or other person interested" to sue in the name of the estate on the bond of any executor or administrator for mismanagement, waste, or other breach of the conditions of such bond. In this state we have no such statute. On the contrary, our statute, § 1538, above quoted, expressly authorizes *any administrator to sue in his own name* for the benefit of all parties interested in the estate on the bond of an executor or of any former administrator of the same estate. This section authorizes such an action for any breach of the bond, and conversion is clearly such a breach. *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113. It would be most incongruous to permit an action against the bondsman which could not be maintained by the same plaintiff against his principal or against his principal's estate. The obvious purpose of the statute is to avoid a multiplicity of suits, since there might be many heirs or legatees, but it is general in its terms, and must be held to apply in all cases. In view of this positive and unequivocal statutory authority of a second administrator to sue, for the benefit of *all persons*

interested, upon the bond of the former administrator of the same estate, we are constrained to hold that § 1431 was intended to authorize a suit of the same character and for the benefit of the same persons by the administrator *de bonis non* against the former administrator or executor personally or against the administrator or executor of his estate.

The supreme court of Georgia has construed a statute of that state, in essential particulars the same as Rem. & Bal. Code, § 1430, above quoted, as giving to the administrator *de bonis non* the right to sue the administrator of a former executor of the same estate to compel an accounting for the proceeds of property of the estate sold by the deceased administrator, and converted into cash. *Knight v. Lasseter*, 16 Ga. 151. Moreover, authority is not wanting that moneys coming into the hands of the first administrator as proceeds of the estate, though not assets received in specie, are still assets in such form as to be traced and, therefore, as between such first administrator and the administrator *de bonis non*, belong to the latter and may be recovered at his suit. *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566; *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124. We have examined all authorities cited by respondent, but shall not review them, since it is admitted that the Arkansas decision above reviewed is more nearly applicable to our statute than any of the other decisions cited.

We do not hold that creditors, legatees, or distributees may not maintain such actions in their own names as they could at common law. That question is not before us. After distribution of the estate, of course, they alone can sue. *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765.

There is no merit in the plea of *res judicata*. The court, in probate, never passed upon Ellen Denton's objections to the appropriation of this money by the former executor. Nor do we find any merit in the claim of estoppel. Ellen Denton was justified in not charging herself as administratrix *de bonis non* with this claim so long as the money was withheld

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and the will was unconstrued. To work an estoppel, her conduct touching this claim must have been such as to redound to her own benefit or to the injury of the respondent. It had neither result. *Peck v. Peck, supra*.

Though we hold that the appellant may maintain this action, it does not follow that she may recover the full sum of \$2,500. It was admitted in argument that all debts of the estate have been paid. Fred M. Schneider had the right to one-half of this sum. His estate will not be required to repay it merely to subject it to the cost of re-administration.

The judgment is reversed, and the cause is remanded with directions to enter judgment in favor of the appellant for \$1,250, with interest from the date of the presentation of her claim to the respondent and for costs.

Crow, C. J., MAIN, and GOSE, JJ., concur.

CHADWICK, J. (concurring).—As to the second proposition discussed by Judge Ellis, while it may be that the common law rule has been enlarged by our statute, it was unnecessary to discuss the question at length or to so hold in this case. The estate had been fully administered. The remedy should have been by a straight action at law. A resort to the circuitous method pursued in the case at bar, with the attendant expense of an unnecessary administration *de bonis non* tending to the diminution of the estate, should not be encouraged. It would have been better to hold to this doctrine, and to have reserved our discussion of the right of an administrator *de bonis non* to sue, until a case involving that question was really before us. The conclusion of the majority is in harmony with my views; for, after all, the court comes down to the very simple proposition—and it is the only thing involved in this case outside of the construction of the will—and directs that a judgment be entered for a one-half of the income, with interests and costs. I understand that the costs of the unnecessary administration will eventually be put upon plaintiff, and for that reason I concur in the result announced by the majority.

[No. 11847. Department Two. July 22, 1914.]

THE STATE OF WASHINGTON, *Appellant*, v.
JOHN G. JOHNSON, *Respondent*.¹

LARCENY—SUBJECTS OF LARCENY—OYSTERS. The legislative enactment declaring certain natural beds of oysters to be state reserve oyster lands is not such a reducing of oysters to actual possession, or a reclaiming of them from their wild state, as to render them subject to larceny.

CRIMINAL LAW—STATUTORY CRIMES—PUNISHMENT. The taking of oysters from any of the state oyster land reserves is a penal offense, under Rem. & Bal. Code, § 5253, making it a misdemeanor, and, as the statute creates a new offense, the punishment can be only that which the statute prescribes.

CRIMINAL LAW—APPEAL—DETERMINATION—SUSTAINING DEMURRER TO INFORMATION—RIGHT TO NEW ACTION. Where a demurrer to an information charging larceny of oysters was sustained by the trial court on the concession of the prosecution that the offense consisted in the taking of oysters from their natural beds in state reserve lands at a time prohibited by statute, on appeal the judgment will be affirmed without prejudice to the commencement of a new action by the prosecuting attorney based upon the violation of the statutory offense.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered January 30, 1914, dismissing a prosecution for larceny, upon sustaining a demurrer to the information. Affirmed.

R. A. Lathrop (*D. F. Wright*, of counsel), for appellant.
T. P. Fisk and *Troy & Sturdevant*, for respondent.

FULLERTON, J.—On January 2, 1914, the prosecuting attorney of Mason county filed an information against the respondent, Johnson, charging him with the larceny of certain oysters, the property of the state of Washington. The information was in the form usual in cases of larceny; it charged that the respondent, at a certain time and place named, did unlawfully and feloniously take, steal, and carry

¹Reported in 141 Pac. 1040.

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away a quantity of oysters, of the value of \$45, the property of the state of Washington, with intent to deprive and defraud the state of its property therein. After his arrest and upon his arraignment, the respondent demurred to the information, on the ground, among others, that the information did not state facts sufficient to constitute a crime. On the argument of the demurrer, the state conceded that its proof would tend to show that the oysters, which were the subject of the larceny, were taken from their natural beds in the state's reserve oyster lands at a time prohibited by the statute for such taking, and that the same had not been reduced to the possession of the state further than the several acts of the legislature creating the reserve oyster lands and prohibiting the taking of oysters therefrom had reduced them to such possession. On this concession being made, the court sustained the demurrer to the information and dismissed the action. The state appeals.

The grounds upon which the learned trial judge rested his decision do not appear in the record except in so far as his views may perhaps be reflected in the argument advanced by the respondent. It is the respondent's contention that oysters are subject to the rule applicable to that class of animals denominated by the common law as animals *ferae naturae*, which were not the subjects of larceny unless reclaimed from their wild state, or reduced to actual possession; and he argues that oysters, lying in their natural beds on the reserve oyster lands of the state, are no different in their situation than are those oysters upon the state's tide lands generally, and may be taken with impunity by any one finding them. On the other hand, the prosecuting attorney contends that the acts creating the reserve oyster lands had the effect of reclaiming the oysters from their original wild state and reducing them to possession; and hence, any one taking them from the reserve lands is guilty of larceny, and can be arrested and punished under the general laws of the state relating to the crime of larceny of personal property.

We are not, however, able to conclude that either of those contentions is correct in its entirety. Unquestionably, we think, oysters, in common with other shell-fish, found on the tide lands belonging to the state, are so far wild by nature that any one finding them may, in the absence of a statute prohibiting the act, take them and convert them to his own use without violating any of the general criminal statutes of the state; and we think, also, that the statutes creating the oyster reserve lands did not, by the mere act of declaring that such lands were reserve oyster lands, change the rule. But we think it does not follow from this that there is no statute, as the defendant contends, under which a person unlawfully taking oysters from the state's reserve oyster lands may be punished. We find in the statutes creating and regulating the control of such lands provisions by which persons may be licensed to take oysters therefrom in limited quantities for designated purposes between certain fixed dates, and a further provision that:

"If any person or persons shall take oysters from any of the state oyster land reserves contrary to the provisions of this act, or shall go upon said reserves and rake up, or otherwise prepare oysters to facilitate the taking of same, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not less than one hundred dollars, and imprisonment for a term of not more than one year, and forfeit any license he or she may then hold." Rem. & Bal. Code, § 5253 (P. C. 373 § 25).

This statute, in our opinion, clearly makes the offense of taking oysters from the state's reserve oyster lands a penal offense, if the same are taken at a time or in a manner prohibited thereby, and subjects the offender to punishment. Since, however, the taking of oysters from such reserve lands is criminal only because the statute has declared it to be so, we think the only penalty that can be inflicted upon the offender is that prescribed by the statute. The rule is general that "Where a statute creates a new offence and denounces the penalty, or gives a new right and declares the remedy,

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the punishment or the remedy can be only that which the statute prescribes." *Farmers & Mechanics' Nat. Bank v. Dearing*, 91 U. S. 29. Or, as said by the Supreme Court of Appeals of West Virginia, in *Ex parte Richards*, 53 W. Va. 555, 45 S. E. 341, "The specification of one punishment excludes any other." As bearing upon the general question, it may not be improper to cite our own cases which hold that a foreign corporation entering into contracts with citizens of our state are not precluded from enforcing the contracts in our courts, notwithstanding such corporations may not have complied with the statutory requirements relative to the doing of business within the state by foreign corporations. These cases were rested on the principle that, where the statute directed the performance of an act and fixed a penalty for a failure to perform it, the only penalty the court would visit upon the offender was the statutory penalty. *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827; *Horrell v. California etc. Ass'n*, 40 Wash. 531, 82 Pac. 889.

In the case of *La France Fire Engine Co. v. Mt. Vernon*, the principle was stated as follows:

"It is a general proposition, sustained by the weight of authority, that, where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so provided is exclusive of any other; at least, no other penalty will be implied."

The foregoing considerations make it clear that the respondent cannot be punished under the general statutes of larceny for the offense the state's counsel concedes the evidence would tend to show he has committed, but we think it equally clear that it shows, contrary to his own contention, that if he has been guilty of the offense of taking oysters from the state's oyster reserve lands in violation of the provisions of the statutes regulating the taking of oysters from

such lands, he can, on conviction thereof, be punished according to the special penalty affixed thereto.

Owing to the somewhat peculiar condition of the record, we have had some difficulty in determining the proper judgment to be entered in this court. The information filed in the cause on its face states facts sufficient to constitute a crime. It was adjudged by the trial court otherwise only because of the nature of the evidence the state conceded it would resort to in order to prove the offense, the court evidently treating the information as amended in that particular. But if we are to treat the information in the same manner, we are bound to conclude the judgment entered erroneous, since we find there is a special statute applicable to the facts stated by the state's representative. If, on the other hand, we send the cause back for trial on the information treating it as amended, another difficulty arises; the information will not state the facts charged as the crime in that clear and concise language required by the statute in criminal pleadings. Lest there be, therefore, some confusion in the defendant's mind as to the crime with which he is charged and he be thereby misled to his prejudice, we will affirm the judgment appealed from, with leave to the prosecuting attorney to commence a new action against him without prejudice as to any question of fact or law arising out of the present proceeding; such action to be in effect a new and independent proceeding.

It is so ordered.

Crow, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

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[No. 11918. Department Two. July 22, 1914.]

**JULIUS JOHANSON, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹**

EMINENT DOMAIN—ACTION FOR DAMAGES—REMOVAL OF LATERAL SUPPORT—TRIAL—INSTRUCTIONS. In an action against a city for damages in grading a street, by reason of undermining the support and foundation of plaintiff's lot and the explosion of dynamite in such a manner as to burst plaintiff's water pipes and loosen the earth under his house and the lateral support of the ground upon which the house was located, thereby causing the earth in front of the house to slide, the theory of the case is based upon the physical injury or direct invasion of property rights, under the constitutional inhibition against damaging private property for public use without just compensation, and not upon the negligent acts of the defendant, and hence instructions basing right of recovery upon the negligence of defendant were erroneous.

PLEADING—ADMISSIONS—NECESSITY OF PROOF. Where the complaint in an action for damages against a city alleges that the necessary claim therefor was filed with the city, and was not denied by defendant, proof of such filing is unnecessary upon the trial.

Appeal from a judgment of the superior court for King county, Humphries, J., entered November 13, 1913, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Reversed.

Million & Houser and *George Friend*, for appellant.

James E. Bradford and *C. B. White*, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover damages to his property caused by a slide.

It is alleged in the complaint that the contractor employed by the city to grade Westlake avenue, in performing the work, undermined the support and foundation of the plaintiff's lot, caused dynamite and other high explosives to be exploded in such a manner as to burst the plaintiff's water pipes and loosen the earth under the plaintiff's house and the lateral support of the ground upon which the plaintiff's

¹Reported in 141 Pac. 1032.

house was located, thereby causing the earth in front of the plaintiff's house to slide toward Westlake avenue, and by reason thereof the plaintiff's property was damaged in the sum of \$1,000. The complaint also alleged:

"That within thirty days after the plaintiff suffered said damage, as aforesaid, he did on the 19th day of January, 1911, present to the said city of Seattle, as provided by the laws and the ordinances of said city, a claim in writing for damages to said property."

The contractor was not made a party; at least was not served with the complaint. The city, only, appeared in the action, and denied generally all the allegations of the complaint, except the paragraph above quoted with reference to the presentation of the claim. For an affirmative defense, it was alleged that the damage which was caused to the plaintiff's property, if any, was caused solely by the negligence of the plaintiff. Upon these issues, the cause was tried to the court and a jury. A verdict was returned in favor of the defendant, and the action was dismissed. The plaintiff has appealed.

Several errors are alleged, but these errors are all based upon instructions to the jury. The court instructed the jury as follows:

"I instruct you that the plaintiff can not recover in this action unless he has proven by a fair preponderance of the evidence that the defendants, or either of them, were guilty of some negligence in the manner of doing the grading complained of herein. The burden of proving such negligence is upon the plaintiff. It is not sufficient for it to appear from the evidence that the defendants, or either of them, were guilty of some negligent act or acts, and that such negligent act or acts might have caused the injury complained of.

"In order to find a verdict for the plaintiff, you must find by a fair preponderance of the evidence that not only such negligent act or acts were performed, but that such negligent act or acts were the proximate cause of the injury. If you find therefrom that the injury complained of naturally followed from the grading of Westlake avenue, then I instruct

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you that, as the city had the right to cause the grading to be done, and the defendant, Holt & Jeffery, was acting under a contract with the said city to do said work, neither defendant is liable in this action, and you should find a verdict for the defendants.

"I charge you that you cannot return a verdict for the plaintiff in this case unless you believe from a fair preponderance of the evidence, either that the grading in question was negligently done, or that the plan of the improvement was unreasonable in view of the requirements of the improvement district, or that the work was both negligently performed and the plan thereof was unreasonable. If the plan of the grade was reasonable and the work done without negligence, there can be no recovery."

The court also instructed the jury as follows:

"The jury are instructed the plaintiff cannot recover in this case unless the acts of the defendants in grading said Westlake avenue were the proximate cause of the slide which caused the injury, and if you believe from the evidence that the slide occasioning the injury was caused or materially contributed to by the character of the ground or by the manner in which the plaintiff filled in his lot, or from any other cause than the acts of the defendant, then you should return a verdict in favor of the defendants.

"You are instructed that, if you find from the credible evidence in the case that there was a probability of a slide without a regrade, that is, if a slide would have occurred notwithstanding the acts of the defendants complained of here, your verdict must be for the defendant."

It appears from the facts in the case that Westlake avenue is a city street running nearly north and south along the west shore of Lake Union, in the city of Seattle. Crockett street intersects Westlake avenue and runs nearly east and west up the hillside. A block west from Westlake avenue is a street known as Lake Terrace. Plaintiff's property is located on the west side of Lake Terrace street or avenue, and is about 40 feet higher than Westlake avenue. In other words, between the plaintiff's property and Westlake avenue is a street

and a block of land. The plaintiff's property is located on the hillside.

In the year 1907, the city council of Seattle passed an ordinance providing for the regrading of Westlake avenue. Condemnation proceedings were had under that ordinance, but the plaintiff's property, more than a block away from the street, was not included in the condemnation action. Afterwards a contract for doing the work was let to Holt & Jeffery, contractors, and the work was thereafter completed. Subsequently the plaintiff's property was damaged by reason of slides occurring on the hillside.

One of the defenses of the city was that the damage was not caused by the regrading of Westlake avenue. There is sufficient evidence in the record upon which the jury might have found in favor of the respondent upon this issue. The last two instructions above quoted are clearly right when applied to the facts; because, if the regrading of Westlake avenue was not the cause of the slides upon the appellant's property, the appellant was clearly not entitled to recover; and that is, in substance, what the court told the jury by these two instructions.

But the other instructions, we are satisfied, were clearly erroneous. The action was not based upon negligence of the city, but was based upon the fact that the city graded the street, and thereby caused the slides upon the plaintiff's property. This case upon this point is controlled by *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 84 Pac. 18, 111 Am. St. 1027, 5 L. R. A. (N. S.) 1086. In that case we said:

"The effect of our decisions, as above stated, is to hold that for a physical injury or direct invasion of property rights, damages are recoverable under the provisions of the constitution that 'no private property shall be taken or damaged for a public or private use without just compensation having been first made.' It follows, of course, that the liability does not depend upon the degree of care or skill used to prevent damage. The question whether the damage to the buildings situated one hundred and twenty feet away from

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the nearest point of appellants' tunnel was caused by the removal of the lateral support of the soil or by shaking the earth by blasts was a question for the jury. But in either event the liability of the appellants was the same whether the damage was caused with or without negligence."

And that is true in this case. If the damage to the appellant's property was caused by the regrading of the avenue, whether negligent or careful does not matter. No question of negligence was presented by the complaint in this case; and it was error for the court to tell the jury that the appellant could not recover in this action unless it was proven by a fair preponderance of the evidence that the defendants, or either of them, were guilty of some negligence in the manner of doing the grading complained of, and that such negligent act or acts were the proximate cause of the injury. We are satisfied, under the rule in the *Farnandis* case above cited, that the three instructions first above quoted were erroneous and should not have been given, because the appellant's right to recover for the damages, if any, caused by the city, does not depend upon the negligence or care exercised by the contractors who did the work. It is true, the jury found a verdict in favor of the respondent, and there was evidence sufficient upon which the jury might have found that the damage to the appellant's property was not caused by the city at all, or by the contractors who did the grading upon Westlake avenue, or by reason of that grade. But the jury may have found that the work done by the city or by the contractors employed by the city was carefully and skillfully done, and for that reason alone returned a verdict in favor of the respondent, as was required by the instructions given.

It is argued by the respondent that the appellant was not entitled to recover at all, because it was not proved that a claim for damages was filed by the appellant within the time required. The respondent relies upon *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080, to the effect that it is necessary to file a claim for damages of this character. But in this

case it is alleged in the complaint that a claim was filed with the city, and that allegation is not denied. It is therefore admitted. It was not necessary, therefore, for the plaintiff to prove that a claim was filed with the city.

The judgment is therefore reversed, and the cause remanded for a new trial.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11934. Department Two. July 22, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v.
FREDERICK LEWIS, *Appellant*.¹

INDICTMENT AND INFORMATION—INCLUDED OFFENSES—MURDER—MANSLAUGHTER. An information charging that defendant did wilfully, unlawfully, etc., and with intent to effect the death of deceased, with his hands, fists, feet and by other means violently strike etc., and otherwise abuse her, with extreme atrocity and cruelty, thereby bruising and lacerating her body, face, head and neck and mortally wounding her, of which mortal wounds she died, includes a charge of manslaughter as well as of murder, and the question of his guilt of either crime was properly submitted to the jury.

HOMICIDE—EVIDENCE—PRIOR ACTS OF VIOLENCE. In a prosecution of a husband for the death of his wife, occasioned by a violent assault upon her, evidence is admissible showing previous violent assaults made by him upon her.

HOMICIDE—EVIDENCE—DYING DECLARATIONS. Dying declarations of a deceased made four or five days before her death, tending to show that the injuries resulting in her death were made by the accused assaulting her, are admissible in evidence, where the evidence further shows that her death occurred as a direct result of the injuries received and that, at the time of making her declarations, she was under the solemn conviction of approaching dissolution.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Refusal of the court to give requested instructions is not prejudicial, where other instructions of the same nature and equally favorable were given by the court.

¹Reported in 141 Pac. 1025.

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SAME—RECORD—STATEMENT OF FACTS—NECESSITY. Refusal to grant a new trial on the ground of misconduct of the jury, occurring out of the presence of the court, is not reviewable in the absence of evidence embodied in the statement of facts touching upon such error.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 29, 1913, upon a trial and conviction of manslaughter. Affirmed.

Marion A. Butler, for appellant.

John F. Murphy and *S. H. Steele*, for respondent.

PARKER, J.—The defendant was charged by information, filed in the superior court, with the crime of murder, as follows:

"He, said Frederick Lewis, in the county of King, state of Washington, on the 18th day of July, 1913, did then and there wilfully, maliciously, unlawfully, feloniously, and with the design to effect the death of one Annie Lewis; with his hands, fists, feet and by other means unknown to the undersigned prosecuting attorney; in an angry and violent manner, strike, beat, kick and otherwise abuse the said Annie Lewis with extreme atrocity and cruelty, thereby breaking the jaw, and severely bruising and lacerating the legs, body, face, head, and neck of the said Annie Lewis, thereby mortally wounding the said Annie Lewis, of which said mortal wounds the said Annie Lewis, on the 25th day of July, 1913, died."

A trial before the court and a jury resulted in a verdict finding him guilty of manslaughter. Thereupon, judgment was rendered, sentencing the defendant to the penitentiary, from which he has appealed to this court.

The evidence produced upon the trial tended to show, and, we think, was ample to warrant the jury in believing, that the death of Annie Lewis was caused by a vicious assault made upon her by appellant in the manner, and by the means, alleged in the information, though he was found guilty of manslaughter only, and thereby acquitted of having made the assault with the intent to effect the death of Annie Lewis.

It is contended in appellant's behalf that the trial court

erred in submitting to the jury the question of his guilt of manslaughter together with the question of his guilt of murder. Counsel's contention seems to be that the crime of manslaughter is not included in the crime of murder, as charged in this information. We are quite unable to agree with this contention. If we should eliminate from the charging language of the information the words "and with the design to effect the death of one Annie Lewis," there would remain a clear and sufficient charge of manslaughter; that is, a charge of homicide which was not "excusable or justifiable." Rem. & Bal. Code, § 2395 (P. C. 135 § 285). We are clearly of the opinion that the crime of manslaughter is included within the charging language of the information, and that the court properly submitted to the jury the question of appellant's guilt thereof, together with the question of his guilt of murder. The jury were, therefore, authorized to find the appellant guilty of manslaughter so far as the charging language of the information and the law applicable thereto is concerned. Rem. & Bal. Code, § 2168 (P. C. 135 § 1205).

Annie Lewis was, at the time of her decease, and for some years prior thereto, the wife of appellant, living with him as such. Evidence was introduced, over the objections of appellant, tending to show previous assaults of a violent nature having been made by him upon her. The admission of this evidence, it is insisted, was erroneous and prejudicial to the rights of appellant. We do not think so. There are numerous decisions holding that previous ill treatment of a wife by her husband, especially in the nature of assaults committed by him upon her, are admissible in evidence against him upon his trial for the murder of his wife. *Fowler v. State*, 155 Ala. 21, 45 South. 913; *Phillips v. State*, 62 Ark. 119, 34 S. W. 539; *Hall v. State*, 31 Tex. Cr. App. 565, 21 S. W. 368; *Roberts v. State*, 123 Ga. 146, 51 S. E. 374; *State v. Fielding*, 135 Iowa 255, 112 N. W. 539; *Thiede v. Utah Territory*, 159 U. S. 510; McClain, Criminal Law, § 417.

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In the text of 21 Cyc. 913, it is said:

"The rule admitting evidence of previous relations applies with peculiar force in the case of the indictment of a husband, charging him with the murder of his wife."

We are of the opinion that there was no error in the admission of evidence of the nature here complained of.

There was admitted in evidence, over the objection of counsel for appellant, dying declarations of Annie Lewis tending to show that the injuries resulting in her death were caused by appellant assaulting her, as charged in the information. These declarations were made after receiving her injuries, but several days before her death. It is insisted that these declarations were erroneously admitted because of the length of time elapsing between the time they were made and the date of her death, and because they are not shown to have been made under a consciousness on her part of impending death. We deem it sufficient to say that, to our minds, the evidence clearly warrants the conclusion that Annie Lewis' death occurred as the direct result of injuries received by her seven days after receiving the same, and that, when she made her declarations introduced in evidence, she was under the solemn conviction of approaching dissolution. This was evidenced by her express declarations then made, and by her critical physical condition then existing, although she did not finally die until some days, possibly four or five, after making the declarations pointing to appellant as the one committing the assault resulting in her injuries. In *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096, Chief Justice Hadley, speaking for the court, said:

"The standard required for the admissibility of the declaration is that the declarant should have believed that she was about to die, that she made the declaration under the belief that she would not recover, and that she did die of the illness from which she was suffering as the direct and proximate result of the original injury which the declaration tended to illustrate."

This is in harmony with the views expressed by this court in *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650; *State v. Power*, 24 Wash. 34, 63 Pac. 1112; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251. We are of the opinion that no error was committed by the trial court in receiving these declarations made by Annie Lewis.

Counsel for appellant complains that the learned trial court erred in refusing to give to the jury certain requested instructions cautioning the jury as to receiving and giving credence to dying declarations. While the instructions were not given in the language requested, other instructions of the same nature and equally, if not more, favorable to appellant than those requested of this nature were given by the court of its own motion. We are quite clear there was no error prejudicial to appellant's rights growing out of this action of the court.

One of the grounds for new trial urged by counsel for appellant is misconduct of the jury. This alleged misconduct, occurring out of the presence of the court, was necessary to be shown by affidavits or other evidence. No evidence touching this claimed error is embodied in the statement of facts, and hence there is nothing properly before us enabling us to pass upon the question of the jury's misconduct. We do not think the cause calls for further discussion. The record here convinces us that appellant has had a fair trial, free from prejudicial error.

The judgment is affirmed.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

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Statement of Case.

[No. 11936. Department Two. July 22, 1914.]

O. S. ARBOGAST *et al.*, *Appellants*, v. ANDREW JOHNSON *et al.*, *Respondents*.¹

FRAUDS, STATUTE OF—CONTRACTS FOR SALE OF REAL ESTATE—EXECUTION—SUFFICIENCY. A memorandum of purchase of certain described real estate, signed by the purchaser, "subject to the owner's approval," but not signed by the owner, nor even disclosing his name though signed by an agent authorized orally to find a purchaser, does not constitute a contract of sale of land within the terms of Rem. & Bal. Code, §§ 8745, 8746, requiring contracts for the conveyance of real estate to be "in writing signed by the party bound thereby;" since the purchaser is the only party bound by the terms of the contract.

SAME—SALE OF REAL ESTATE—CONTRACT OF AGENT—RATIFICATION. Ratification of a sale of real estate made by an agent for the owner, which was unenforceable under the statute of frauds, is not shown by the act of the owner in receiving the earnest money paid to his agent by the purchaser who was a tenant of the owner, but declining to approve the sale and applying the money on the rent due, nor by the further fact that the owner gave his agent an abstract of title to deliver to the prospective purchaser, coupled with the understanding that it was not to be delivered until the payment of an additional specified sum as earnest money.

SAME—PLEADINGS—ISSUES AND PROOF. A party to an action may invoke the application of the statute of frauds without pleading it, where the contract in issue is set out in full in the pleadings and shows on its face that it is such a contract as is required by law to be in writing.

Appeal from a judgment of the superior court for King county, French, J., entered March 18, 1914, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Reversed.

Edward Judd, for appellants.

William D. Covington and *Geo. A. Meagher*, for respondents.

¹Reported in 141 Pac. 1140.

PARKER, J.—The plaintiffs commenced this action in the superior court for King county, to recover from the defendants the possession of lot 9, block 14, Bigelow addition to Seattle, to recover damages for withholding possession, and to quiet title as against the claim of defendants made under an earnest money receipt purporting to be a contract for the sale of the lot to them by the plaintiffs' grantor. The defendants answered, setting up their claimed right to purchase the lot under the earnest money receipt. A trial before the court resulted in findings and judgment in favor of the defendants, from which the plaintiffs have appealed.

On, and for some months prior to, May 14, 1913, the lot here in question was owned by A. C. Gould, and occupied by respondents as his tenants, at a rental of \$15 per month. On that date, and for some time prior thereto, O. S. Arbogast was engaged in the real estate agency and rent collection business. He collected, from time to time, for Gould, rent due to him from respondents. He was also authorized by Gould to find a purchaser for the lot, though he was not so authorized in writing. On that day, respondent Andrew Johnson paid to appellant O. S. Arbogast \$25, when a paper was made out and signed by them, reading as follows, so far as it is here necessary to notice its contents:

“Earnest Money Receipt.

“Seattle, Wash., May 14, 1913.

“Received from Andrew Johnson the sum of \$25 to apply on this contract for the purchase of the following described real estate, situate in King county, Washington, to wit: lot nine block fourteen Bigelow Addition to City of Seattle . . . [here follow terms of payment of balance of purchase price, etc.]

“.....Owner

“By O. S. Arbogast, Agent

“Subject to the owner's approval, I hereby agree to the above provisions.

Andrew Johnson, Purchaser.”

This paper does not contain the name of the owner of the lot, nor any reference to the owner other than that shown in

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the above quotation therefrom. Thereafter, on June 30, 1913, Gould, the owner, conveyed the lot by warranty deed to appellants Arbogast and wife. Thereafter, on August 11, 1913, respondent Andrew Johnson caused this writing to be recorded in the office of the auditor of King county.

One of the questions here presented is as to the binding force of this writing, viewed as a contract for the conveyance of the lot, in the light of our statutes requiring contracts for the conveyance of real estate to "be in writing, signed by the party bound thereby." Rem. & Bal. Code, §§ 8745, 8746 (P. C. 143 §§ 1, 3). That this writing was not signed by the owner of the lot, nor even disclosed who the owner to be bound is, we think, too plain for argument. It is equally plain, from the evidence, we think, that it was not signed by Arbogast for the owner by virtue of any previous authorization from the owner. Indeed, upon its face, it plainly shows that it was to be of no force in any event until approved by the owner. This being the condition of the writing at the time of its execution, we are constrained to regard it as wholly wanting in having any party thereto who is bound to convey the lot. It does not, upon its face, purport to bind anyone except respondent Andrew Johnson, and not even him until approved by the owner.

In *Grafton v. Cummings*, 99 U. S. 100, there was involved a writing the same as this in substance, so far as its force in the light of the statute of frauds is concerned, there being no owner named in the writing, though it was signed by the purchaser and indorsed "A. R. Walker, auctioneer and agent for both parties;" the sale having been an auction sale in behalf of an estate. Disposing of the owner's right to recover the purchase price from the purchaser who signed the writing, Justice Miller, speaking for the court, said:

"The distinct objection to the instrument, as so presented, is, that the other party to the contract of sale is not named in it, and can only be supplied by parol testimony. The statute not only requires that the agreement on which the action

is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing, that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and to deliver the consideration for the price so paid.

"There can be no bargain without two parties. There can be no valid agreement in writing without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that if a vendor was named in this paper, the offer to perform on his part would bind the party who did sign. But Grafton did not agree to buy this property of anybody who might be found able and willing to furnish him a title. He was making a contract which required a vendor and a vendee at the time it was made, and he is liable only to that vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity."

This principle is, to our minds, clearly applicable to the problem here presented. We think it is decisive against the validity and binding force of this writing at the time of its execution.

Assuming, now, for argument's sake, that this writing was such as could be rendered binding and enforceable by its subsequent ratification upon the part of the owner of the lot,

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Was it ratified by him? We are unable to decide this question in favor of respondents, in the light of the evidence introduced. There was evidence introduced upon the trial tending to show that Gould, the owner, received \$25 from his agent, appellant Arbogast, following the signing of this writing by Arbogast and Johnson, knowing that it had been so signed; but at that time Gould declined to approve the proposed sale, and accepted the money from Arbogast to apply on rent then due to him from respondents Johnson, the amount of the rent so due being equal to the sum of \$25 or more. The evidence, we think, is quite clear that Gould never accepted money as earnest money upon any proposed sale of the lot. The evidence also tends to show that Gould delivered to Arbogast an abstract of title to the lot for the purpose of having Arbogast deliver such abstract to Johnson as a prospective purchaser thereof, but with the understanding that it was not to be so delivered until Johnson had paid at least \$75 as earnest money upon the prospective sale. Plainly, the abstract was not delivered by Gould to Arbogast with a view of approving the sale. This is all of the evidence tending to show ratification by Gould of the proposed sale. We conclude that Gould never ratified or approved any contract sought to be evidenced by this writing.

Some contention is made in behalf of respondents that appellants should not be permitted to take advantage of the statute of frauds in avoiding the effect of this writing, for want of proper pleading on that subject. The answer to this contention is found in the fact that the writing claimed to evidence the contract is set out in full in the pleadings, and, of course, being for the conveyance of real estate, appears upon its face to be a contract such as is required by law to be in writing. Its legal existence as a contract also appears to be challenged in the pleadings, though the statute of frauds is not relied upon by specific reference thereto in the pleadings. Under our decisions in *Goodrich v. Rogers*,

75 Wash. 212, 134 Pac. 947; *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 135 Pac. 660; and *Thompson v. English*, 76 Wash. 23, 135 Pac. 664, we think appellants are not precluded from invoking the statute of frauds in this case as against the claimed force and effect of this writing as a contract.

We conclude that the judgment of the trial court must be reversed; that appellants are entitled to a judgment against respondents quieting their title as against the claims of respondents to the lot in question; that appellants are entitled to a cancellation of the writing designated "earnest money receipt" here involved, recorded in the office of the auditor of King county; and that appellants are also entitled to a judgment against respondents for the amount of the rental value of the lot in question, to wit, \$15 a month from and after the 30th day of June, 1913. The judgment is reversed, and the cause is remanded to the trial court with directions to enter its judgment and decree accordingly.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

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[No. 11939. Department Two. July 22, 1914.]

ELLA GUIGNON, *Respondent*, v. ANNA S. L. CAMPBELL *et al.*,
Appellants.¹

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR NEGLIGENCE OF CHILD. A married woman is liable to a judgment for damages against her separately for personal injuries resulting to one by reason of the negligence of her child in operating an automobile, where such automobile was her separate property, and was being used by the child for family purposes with her consent.

DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES—REMISSION. A verdict for \$9,250, in an action for personal injuries, is more than compensatory, although the plaintiff was seriously injured, where it appears that she was not entirely incapacitated and deprived of her earning power, that, at the time of injury, she was forty-eight years of age, earning \$30 per month with continuous employment, and capable of earning as a nurse from \$15 to \$25 per week with intermittent employment, and that her actual loss in the way of clothing and doctor's bills did not exceed \$300; and warrants a reversal and new trial in the case, unless plaintiff files remittitur of \$4,250.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 23, 1913, upon the verdict of a jury rendered in favor of the plaintiff for \$9,250, for personal injuries sustained by a pedestrian struck by an automobile. Reversed, unless \$4,250 is remitted.

John A. Coleman and Hughes, McMicken, Dovell & Ramsey, for appellant Anna S. L. Campbell.

Trefethen & Grinstead, for appellant Archie W. Campbell.

Walter S. Fulton, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages for personal injuries which she claims resulted to her from the negligent operation of an automobile by the defendant Archie Campbell, the son and agent of the defendant Anna S. L. Campbell. The trial resulted in verdict and judg-

¹Reported in 141 Pac. 1031.

ment in favor of the plaintiff against both of the defendants in the sum of \$9,250, from which they have appealed.

Appellant Anna S. L. Campbell is a member of a community consisting of herself and husband, maintaining their home in Seattle. Appellant Archie Campbell is a son of Mrs. Campbell, and a member of her family. Mrs. Campbell owns an automobile, it being her separate property. The automobile, by Mrs. Campbell's consent, is used for, and by, the family in the usual manner of family conveyances. It is driven by different members of the family, including Archie Campbell. On April 5, 1913, Mrs. Campbell was absent from her home in Seattle; but, with her approval, given before her departure, her daughter, a member of the family, gave to some friends, at their home, a luncheon. To assist in the work of the luncheon, an extra servant was procured for the day, and during the evening it became necessary to convey this servant to a street car that she might return to her home. Archie Campbell, at the request of the daughter, his sister, then proceeded with the servant to the street car in his mother's automobile. Mrs. Campbell, being absent at the time, knew nothing of this particular use of the automobile, but that it was such use of her automobile as she contemplated might be made seems quite plain. The automobile had been put to general family use at her instance before her departure, and she says in her testimony, "While I was gone, the machine was just left with the family to be used, with no specific instructions as to what it was to be used for, . . . I left the machine there to be used for the family purposes as the occasion might arise." While appellant Archie Campbell was driving the servant to the street car, the automobile ran over respondent, because of his negligent driving, as is now claimed, inflicting serious injury upon respondent for which she seeks recovery in this action.

Contention is made that the cause should have been disposed of in favor of appellants, as a matter of law, by the trial court upon their motions for directed verdict. In so far

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as these motions involve the questions of the negligence of Archie Campbell and the contributory negligence of respondent, we deem it sufficient to say that a reading of the evidence convinces us that neither could have been decided as a matter of law, and were clearly questions of fact to be determined by the jury. We do not feel called upon to review the evidence in detail here.

The principal contention made by counsel in behalf of appellant Anna S. L. Campbell is that she is not liable to a judgment for damages against her separately, as is the effect of the verdict and judgment here rendered, and that the court should have so decided as a matter of law. We have seen that Mrs. Campbell was the owner of the automobile as her separate property; that she authorized its use by her children for family purposes; and that this particular use was clearly within that contemplated by Mrs. Campbell. The question of the liability of a father, flowing from the negligent use of his automobile while being used for family purposes, was so thoroughly reviewed by Judge Ellis, speaking for the court in *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821, that we think little need be said here. The conclusion there reached by the court, which we think is equally applicable here, is tersely expressed at page 493, as follows:

"A father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent."

It is true, in the case before us, the automobile was the separate property of the wife, but we are unable to see that the principle announced in the *Abercrombie* case is not equally applicable to her and her separate liability. This use of the automobile by her children was not like the use of it by a stranger to whom she might have loaned it. Of course, she

was not obliged to furnish an automobile or its use to her children or her family from the proceeds of her separate property; but having voluntarily done so, it became, in effect, a use by her. She permitted such use manifestly as a part of her parental duty, and made the furnishing of the automobile "her affair, that is, her business," paraphrasing the expression used in the *Abercrombie* case relative to the father in that case. We are of the opinion that the learned trial court ruled correctly in declining to absolve Mrs. Campbell from liability upon the ground here urged.

It is contended in behalf of both appellants that the verdict is excessive to the extent that it shows passion and prejudice on the part of the jury. We are constrained to agree with this contention, and regard the verdict as clearly more than compensatory. That respondent was seriously injured, there is ample evidence to show, but it is manifest that she was not by any means entirely incapacitated and deprived of her earning power. At the time of her injury, she was earning \$30 per month, with continuous employment as a nurse, though the evidence tended to show that she was capable of earning as a nurse from \$15 to \$25 per week, though when employed by the week, she would not have continuous employment. At the time of her injury, she was approximately forty-eight years old, and had an expectancy of approximately twenty-two years. It is highly probable that her earning power would tend to decrease rather than increase, in view of her age. Her actual loss in the way of injury to clothing and doctors' bills did not exceed \$300. The award of \$9,250 made by the jury would yield, at legal rate of interest, in all probability, somewhat more than her earning power, measured by her past experience, without any diminution of the principal. We feel constrained to hold that we would not be warranted, in view of all the circumstances, in allowing a verdict and judgment in excess of \$5,000 to stand against appellants in this case.

Other claims of error, we think, are without merit, especial-

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ly in so far as their prejudicial effect is concerned. We do not see any useful purpose to serve by discussing them.

We conclude that if respondent will consent to a reduction of the judgment in her favor to \$5,000 by remission of \$4,250 therefrom, we will not interfere therewith. Otherwise the judgment must be reversed and a new trial granted to appellants. If respondent remits from the judgment as now entered the sum of \$4,250, within thirty days from the filing of the *remittitur* in the superior court, the judgment will stand affirmed. Otherwise, appellants may have a new trial and the present judgment be regarded as reversed. Appellants will recover their costs upon this appeal.

Crow, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11942. Department Two. July 22, 1914.]

SUSAN FAULEY, *Respondent*, v. EARL J. McLAUGHLIN, *as Administrator etc., et al., Appellants*.¹

GIFTS—CAUSA MORTIS—REQUISITES—DELIVERY. Under the rule that, in order to constitute a gift *causa mortis*, the donor must not only signify his intention to make the gift, but he who asserts title by gift must prove delivery, either actual or symbolical, by clear and satisfactory evidence, such a gift is not established by evidence showing that decedent, at the time he was preparing to undergo a surgical operation, wrote, sealed and addressed, but never mailed, a letter to the lady to whom he was engaged to be married, reciting that "if anything should happen to me, I want you to have one-fourth ($\frac{1}{4}$) of my entire estate after debts, if any, are paid;" that he recovered from the operation, but died from the infirmity about a year and a half later; that subsequent to writing the above letter, he made inquiries of an attorney in regard to the execution of a will, and was told that, in the absence of a will, his estate would be divided share and share alike among his sisters; and the above letter after his death, being found among his effects, still sealed, was mailed by the sisters, in ignorance of its contents, to the lady to whom it was addressed.

¹Reported in 141 Pac. 1037.

Appeal from a judgment of the superior court for King county, Smith, J., entered October 23, 1913, upon findings in favor of the plaintiff, in an action to recover an interest in an estate. Reversed.

E. L. Skeel and W. M. Whitney, for appellants.

James E. McGrew and E. P. Dole, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover a one-fourth interest of the net value of the estate of Charles E. Eastman, deceased. The action is based upon a letter written by Mr. Eastman, as follows:

“Seattle General Hospital

“Seattle, Wn., July 30, 1910.

“Susie Dear: Dr. Peterkin tells me he is going to open my kidney Monday and put in a drainage tube.

“If anything should happen to me, I want you to have one-fourth ($\frac{1}{4}$) of my entire estate after debts, if any, are paid.

“Lots of love from yours faithfully.

“C. E. Eastman, Gramp.

“To Miss Susie Fauley,

“Phoenix, Ariz., R. F. D. No. 2.”

After a demurrer to the complaint had been overruled, and issues made on the allegations of the complaint, the case was tried to the court without a jury. The court made findings of fact in favor of the plaintiff, and entered a judgment as prayed for in the complaint. The defendants have appealed.

The principal question of fact tried below was whether or not Miss Fauley and the deceased, Charles E. Eastman, were engaged to be married at the time of Mr. Eastman's death. The court found as a matter of fact that they were so engaged, and we shall assume in this opinion that the court correctly found from the evidence upon this fact.

The facts of the case, aside from the question of the engagement of Miss Fauley to Mr. Eastman, are substantially undisputed, and are as follows: Mr. Eastman died intestate on February 18, 1912, leaving in this state an estate valued

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at more than \$200,000, consisting of both real and personal property. The appellants, Lilly Tracy, Emma A. Abbott, and Electra Wood, are the sisters and only heirs of the deceased.

Prior to the year 1894, Mr. Eastman was engaged in the logging business, near Saginaw, Michigan. In that year, he met financial reverses, and was left largely in debt with no property to meet his obligations. In that year, he met Miss Fauley, who was then a girl eighteen years of age. He was a man of thirty-eight. They became engaged to be married in 1894. In the year 1900, Mr. Eastman came to the city of Seattle. He was then \$18,000 in debt. He thereafter acquired large interests in real estate and timber lands in this state. He was furnished money by friends in the east who had an interest with him in these lands. From that time until 1910, his business ventures were successful, and, while he had no ready money of his own, he held his interests until about the year 1911. The apparent reason why he and Miss Fauley were not married was that, prior to the year 1910 his financial condition was not favorable to marriage, and after that time his health did not permit of marriage. He visited Miss Fauley at her home in Phoenix, Arizona, where she was living with her father, in the year 1900. And she, at his request, visited Mr. Eastman in Seattle in the year 1907; and again in the year 1909.

In the year 1910, Mr. Eastman was taken sick and his physician advised him that an operation would be necessary. He went to the Seattle General Hospital on July 30, 1910, and on that day wrote the letter hereinabove quoted. This letter was written by Mr. Eastman prior to undergoing the operation mentioned. The letter was enclosed in a government stamped envelope, sealed, and addressed to the plaintiff. It was not mailed. The operation mentioned was performed on the next day. Mr. Eastman thereafter recovered from its effect. After his recovery, he transacted his business as usual until in the year 1911, when he sold one-half of his

real estate holdings, closed his office in Seattle, sold his office furniture, and moved his papers and belongings to a basement in the house of a friend in Seattle. The disease from which he was suffering from the time of the operation until the time of his death is stated as "Bright's disease."

In January, 1912, he again went to the hospital in Seattle, and was advised by his physician to go to the Battle Creek sanitarium, in Battle Creek, Michigan. At that time, he was in a very weakened condition. He and a friend of his packed his baggage. His valuable papers, including notes, mortgages, and deeds to real estate, were placed in a large trunk and checked through from Seattle to Battle Creek. A suit case and a satchel were also packed with necessary articles that he desired to take with him. In the satchel, which was not opened from the time he left Seattle until after his death, were some old letters, receipts, and memorandum books, maps, etc. Among these was the letter hereinabove quoted. Whether this letter was packed in the satchel by the deceased, or by his friend, is not shown. A nurse was employed to accompany him on his journey from Seattle to Battle Creek. On the trip east, he was not able to leave his berth. He was cared for by the nurse. When they arrived at Chicago, he was met by one of his sisters. He left Seattle for Battle Creek on February 4, 1912. He arrived at the Battle Creek Sanitarium on the 10th of February, and thereafter gradually declined until February 18, 1912, when he died of cirrhosis of the liver. After his death, his body was taken by his sisters to Bradford, Vermont, for interment.

Thereafter, on February 27, 1912, his sisters investigated the contents of his baggage, and found mortgages and notes of the face value of \$80,000, and other valuable papers in his trunk. In the satchel they found the envelope containing the letter above quoted. Not knowing the contents of this letter, and knowing nothing of the person to whom it was addressed, they caused the letter to be placed in the mail, and in due course it reached Miss Fauley.

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An administrator of the estate was afterwards duly appointed in Seattle, this state. Miss Fauley filed a claim with the administrator, claiming a one-fourth interest in the estate of the deceased. This claim was rejected by the administrator, whereupon this action was brought against the administrator and the three sisters of the deceased.

Upon the trial of the case, it was shown by the plaintiff that, after the date of July 30, 1910, Mr. Eastman had inquired of an attorney in Seattle concerning the requisites of a will, and was informed that, in the absence of a will, the law provided that his estate would be divided share and share alike among his heirs, which were his three sisters. In his memorandum book, after the date of the letter, was a notation in his handwriting as follows:

"Nonintervention will, which provides that no court proceedings are necessary, but to take advantage of this clause, same must so state in the body of the will. Straight will."

The trial court was of the opinion that the letter above quoted showed an intention on the part of the deceased to leave a one-fourth interest in his estate to Miss Fauley, his fiancée. And we have no doubt that such was his intention at the time the letter was written, if he had died under the operation referred to, or from the effects of that operation. But the fact is clearly shown that he recovered from that operation, and went about his business for more than a year thereafter. The letter was never mailed to Miss Fauley by Mr. Eastman. He apparently wrote the letter with his own hand, and placed it in the envelope, sealed it, and put it away among his effects. After that time, he inquired of an attorney, then practicing in the city of Seattle, in regard to the requisites of a will, and the necessity for one, and was advised upon these points. No will appears to have ever been drawn or executed by him. After that time, while he was possibly improved in health, the disease was upon him which finally carried him off. He was conscious, according to the testimony, up to within two days of his death. He did not men-

tion a will, nor did he mention the fact that he had written the letter. It was discovered when searching through his effects, and mailed at the instance of his sisters to the person to whom it was addressed. While it no doubt was his intention at the time the letter was written to leave an interest in his estate to his fiancée, it is not shown by clear evidence that that intention existed a year and a half afterwards when he finally came to die.

Many authorities are cited by the appellants and by the respondent upon the effect and requisites of a gift *causa mortis*. But we think our own decisions are sufficient upon this point. In *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240, where a deed had been signed but not delivered, and which was found among the papers of the grantor after his death, and where it was not clearly shown by the evidence that the deed had been delivered, or that the grantor intended that it should be, it was held that the deed did not become effective. In that case this court said:

“In coming to these conclusions we have not lost sight of the able argument and large array of authorities contained in the brief of appellant, to the effect that the delivery of a deed does not necessarily require any formal act on the part of the grantor; that it is often a question of intention; that a deed may become operative while the manual possession is retained by the grantor. But in such cases, before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown, and neither the findings of fact by the referee nor by the superior court, nor the evidence in the case, satisfies us that the grantor in the deed under consideration ever did anything with the intention that by doing it he had so delivered the deed as to make it presently operative.”

In *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119, where John W. Collins gave his check for \$4,000 to Frank Phinney, and said: “If I do not get over this I want Frank to get my money; I don’t want it to go to Skagit county;” and before the check was cashed Mr.

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Collins died, we held that the delivery of the check was sufficient as a gift *mortis causa*. We said in that case, at page 243:

"And, recurring again, a moment, to the essential qualifications of the gift, it is true that, in cases of gifts *mortis causa*, there must be a delivery of the thing given, and this is the rock upon which courts have so often split. And it is also true that it must be as nearly an actual delivery to the donee as the circumstances of the case, and the nature and actual position of the donee, and the thing given, will permit. But, in the very nature of business transactions of this kind, this delivery must frequently be constructive. The nature and circumstances surrounding this case necessitated a constructive delivery. The subject of the gift was not available. The decedent did all that was in his power to do to deliver the money in the bank at LaConner to the appellant. So that, in justice and common sense, it seems to us that the delivery was complete, and that the will of the deceased ought not to be thwarted by any technical construction or definition of delivery."

In *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924, where the deceased, during his last illness, called in a neighbor and directed him to prepare a deed and a will in order that he might execute them, where a deed was accordingly prepared purporting to convey the property in controversy to three minors, where the instrument was signed by the grantor in the presence of witnesses but was not acknowledged because there was no officer present authorized to take acknowledgments, where the grantor stated that he would appoint Mr. Johnson to have the deed acknowledged and properly executed, we held that the deed was sufficient, and that the intention to consummate the transaction was clearly and unequivocally shown.

In *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857, where a donor had stated that he had given his personal property to his nephews, and there was evidence that the boys had been in full control of the property, we held that the gift was complete. In that case we said:

"While it is true the courts have relaxed the rigor of the old rules, they have never departed from holding that something more is required to constitute a gift, either *inter vivos* or *causa mortis*, than the expression of an intent or purpose to give. Evidence of such intent is admissible to prove the act, but it does not constitute the act, and delivery, either actual or constructive, is as essential today as it ever was. The donor must not only signify his purpose to give, but he must deliver, and as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory. Although it may not be true that the law now presumes against a gift, it certainly does not presume in its favor, but requires proof. *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; *Delvin v. Greenwich Sav. Bank*, 125 N. Y. 756, 26 N. E. 744. The modern rule that, the intention of the donor having been ascertained, great latitude should be given in carrying out that intention, still demands a delivery as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit."

And in *Thatcher v. Capeca*, 75 Wash. 249, 134 Pac. 923, where a deed had been executed by the grantor prior to his death, and where the grantee had been placed in possession of the property, and the grantor directed that the deed be recorded after his death and charged a third person with the duty of recording the deed, and attempted to deliver possession of the deed prior to his death, we held there was a sufficient delivery of the deed. In that case, quoting from *Atwood v. Atwood*, *supra*, we said:

"But in such cases before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown."

From these cases, it is clear that, in order to constitute a gift *causa mortis*, there must not only be an intention to make the gift, but there must be something done to complete the gift. The donor must not only signify his purpose, but he who asserts title by gift must prove delivery, either actual

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or symbolical "by evidence that is clear, convincing, strong and satisfactory."

In this case, the intention to make a gift at the date the letter was written is all that was proved. There was no delivery of the letter by Mr. Eastman, either to the United States mail, or to any person with instruction that it be mailed. Its mailing after the death of Mr. Eastman was without authority and was purely accidental. After the date of the letter, it is shown without dispute, that Mr. Eastman inquired as to the law of this state with reference to the descent of his property, and was informed that, without a will, it would go to his sisters, share and share alike. He afterwards made no will. He was in the possession of his faculties for a year and a half after the date of the letter. He either knew he had the letter in his possession, or he had forgotten its existence. At any rate, he did nothing to deliver the letter, and certainly did nothing to deliver any of his property to the respondent. The fact that he intended to give to the respondent one-fourth of his property after his recovery from the operation mentioned, is entirely overcome by the fact that he afterward made inquiries with reference to the descent of his property, and thereafter executed no will. There is no claim that he attempted, either actually or symbolically, to deliver any of the property which he intended to give to the respondent. He had ample opportunity after the date of the letter to give to the respondent a part or all of his property by will or otherwise, but he did not avail himself of that opportunity. He knew that, under the law, without a will, his property would descend to his sisters, and to no one else. He made no will. We are satisfied that the proof in this case fails entirely to show a completed gift *causa mortis*, or at all. The most that it does is to show that Mr. Eastman intended a gift a year and a half before his death; but this intent was never carried into execution. It clearly failed under the liberal rule of our own cases above cited.

The judgment of the lower court is therefore reversed, and the cause ordered dismissed.

CROW, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 11879. Department Two. July 23, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. K. TAKEUCHI,
Appellant.¹

LIBEL AND SLANDER—CRIMINAL RESPONSIBILITY—INFORMATION—TRANSLATION OF PUBLICATION. An indictment or information for criminal libel published in a foreign language must set out the defamatory words verbatim and follow them with a proper translation; but it is not essential that the words shall be identical in translations made by different persons, but is sufficient if there is no difference in the ideas conveyed.

SAME—OFFENSES—WORDS LIBELOUS PER SE. A published statement that the prosecuting witness visited the defendant's printing office and threatened to kill him, that he had been unduly intimate with defendant's wife, and had maintained improper relations with the wife of a man whose name was not disclosed, is libelous *per se*.

SAME—EVIDENCE—INJURY. In a prosecution for the publication in the Japanese language of an article libelous *per se*, where the prosecuting witness testified that his business credit was injured by reason of the loss of Japanese custom, evidence on the part of defendant showing such injury was occasioned by loss of credit with American dealers is inadmissible, when it was not shown that such dealers could have read the article in the Japanese language.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 25, 1913, upon a trial and conviction of criminal libel. Affirmed.

P. V. Davis, for appellant.

John F. Murphy and *Edgar J. Wright*, for respondent.

MOUNT, J.—The appellant in this case was convicted upon a charge of criminal libel. He was fined \$150 and costs. He has appealed from that judgment.

¹Reported in 141 Pac. 1145.

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The appellant is a Japanese. He was the publisher in the city of Seattle of a paper called the "Great Northern Daily News." This paper was published in the Japanese language, in Japanese characters. The prosecuting witness is also a Japanese. To the information filed by the prosecuting attorney is attached a copy of the newspaper containing the libelous article, and also a translation of the article into English. The alleged libelous article, as translated by one Nakai, a Japanese, is as follows.

"Particulars Leading to Mr. Tanabe's Domestic Disorder.

"Scoundrel Yamakita's Violence

"His Improper Relations with Kimi Tanabe.

"Hyotaro Yamakita, who on ordinary occasions is a wolf in sheep's skin and modifies his true manners whenever he goes to a respectable family, at last betrayed his true character in connection with the present case. Seeing himself daily reported in this paper and unmindful of his own fault, Yamakita accuses and puts all the blame on Tanabe as the designer.

"Yamakita, greatly enraged, frequently comes either to Tanabe's printing office or to his room at the Togo Hotel and threatens to kill or shoot him dead with a pistol.

"Mr. Tanabe, who is an affable and upright man, became very much alarmed and through Mr. Setsuda appealed to the Japanese Association to protect his life and property. Hearing life and property in danger, Secretary Nakashima of the Association according to the need of the case, went at once to the police station, reported the circumstances and secured a policeman to watch and protect Mr. Tanabe.

"Last Sunday there was a funeral ceremony at the Woman's Home. Among those assembled was found a white, round faced beauty and directly next her was a big and fat man, measuring five feet four inches in height, and one hundred and seventy pounds in weight, and again, beside him was a young man appearing like a University student. The woman was Kimi and the men were Yamakita and Nakai. They, forgetful of their degraded selves, came out to a public meeting openly and impudently. That 'Love is blind' might be said of such audacity and indecency as theirs.

"This man Yamakita must have left a wife in Japan, but a year or two ago he had an adulterous relation with the

wife of a man whose name we do not disclose. Both Mr. Kumai and Mr. Hoshide are prominent Christians. It might be that Yamakita, believing in the Principle that God is love, had a desire to secure a baptism of love; but, perhaps he was weak in his faith, for he could not accomplish his end. Then he changed Christianity for Buddhism and clung to the mercy of Buddha. There in the Buddhist prayer-book it is written that if a good man wants a woman he must pray to the goddess of mercy with his whole heart and then he shall have the most beautiful woman. It means, therefore, that Yamakita went to the protected isle for beautiful women in Buddhism and was given its queen."

A demurrer to the information was overruled. When the case came on for trial, the Japanese who made the translation was not present as a witness. Another Japanese was called and testified that the translation attached to the information was substantially correct. He testified that there were words in the translation which he would change. A motion for a directed verdict was thereupon denied.

Witnesses upon the part of the defense testified that the translation was not correct. One of the translators for the defense translated the headlines as follows:

"Particulars Concerning Mr. Tanabe's Domestic Troubles. Scoundrel Yamakita's Violence. Strange Relation with Kimi Tanabe. Misconduct of Gentoku Nakai."

They also made some verbal changes in the words used.

The appellant now insists that the court erred in overruling the demurrer and in refusing to dismiss the case. As we read the original translation, and the translation contended for by the appellant to be a correct translation, we are satisfied that there is no difference in the ideas conveyed. The translations of both the witnesses for the state and the witness for the appellant are identical in so far as the ideas conveyed are concerned. The difference in translation is a mere difference in words, which, taken in connection with the whole article, mean the same things.

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The appellant argues and cites authorities to the effect that the indictment must set out the defamatory words verbatim, and that the foreign language must be followed by a proper translation: Citing 25 Cyc. 578; 2 Bishop, Criminal Procedure 792; and 6 Am. & Eng. Ann. Cas. 782, and note. This is undoubtedly the rule. But by a proper translation, or a correct translation, is not meant that every word in the original must be susceptible of but one meaning in English and that meaning conveyed by a particular word. It was shown by the examination of the witness that the Japanese language is an idiomatic language; that these idioms may be expressed in different words having the same meaning in the English language. And this is the only objection that appears to be taken to the translation. For example, in the original article it was translated:

"Hoyotaro Yamakita, who on ordinary occasions is a wolf in sheep's skin and modifies his true manners whenever he goes to a respectable family, at last betrayed his true character in connection with the present case."

While one witness for the defense testified that the proper translation was as follows:

"The integrity of a pine tree can be proved by the coldness of the year, and when a man is poor he can know the bottom of his friend's heart. So, Hyotaro Yamakita, who, usually assumes an air of modesty and is diplomatic whenever he visits respectable family, at last betrayed his true character in connection with the present case."

It is true that the words of these translations are not identical. But it is apparent that the meaning is the same. The authorities above cited lay down the rule that the translation must be a proper and correct translation. But what is meant is that the idea must be correctly translated; it is not necessary that the words shall be identical in different translations. It is hardly possible to translate an article from one language into another, especially where both languages are idiomatic, without different translators using

different words to express the same idea. We are satisfied, therefore, that the translation was substantially correct, and that is all that was necessary. It is plain from either translation that the article was libelous *per se*. It accused Yamakita, the prosecuting witness, of frequently visiting Tanabe's printing office and threatening to kill him, which is a crime under the statute; it accused the prosecuting witness of undue intimacy with Kimi Tanabe, the wife of Mr. Tanabe; and it accused the prosecuting witness of improper relations with the wife of a man whose name was not disclosed. In these particulars, the published article was clearly libelous *per se*. The court did not err in refusing to dismiss the case.

Upon the trial of the case, the prosecuting witness testified that, after the publication of the article, his reputation was injured, and his business was destroyed through the loss of customers, so that he had to suspend; that he lost the esteem of his friends, etc. The witness explained that his credit was injured by reason of the loss of Japanese custom, which he had theretofore enjoyed. The defendant on cross-examination, attempted to show that the prosecuting witness had bought goods on consignment from American dealers, and that he had refused to pay therefor; and that this was the cause of his loss of business. Evidence was introduced along this line, and finally the court rejected further proof thereon. This is assigned as error. We are satisfied that the court committed no error in this respect, because it was not shown that Americans with whom the prosecuting witness did business had read, or could have read, the article. It is very apparent that the ordinary American, if he had seen the article, could not have read it.

In defense, there was an attempt to prove the truth of the article; but there was no attempt to prove the truth of the statement that the prosecuting witness had threatened to shoot Mr. Tanabe. An effort was made to show that the prosecuting witness assaulted Tanabe at one time with a hatchet. This evidence was stoutly denied on the part of

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the prosecution. There was also an effort to show that the prosecuting witness was unduly intimate with Kimi Tanabe, the wife of Mr. Tanabe. This was stoutly denied by the prosecuting witness. The jury evidently disbelieved the evidence of the appellant upon these questions.

Other points alleged as error are of no sufficient importance to justify consideration. The article was clearly libelous, and published with malice and without justification.

The judgment is therefore affirmed.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 11781. Department One. July 23, 1914.]

KANASKAT LUMBER & SHINGLE COMPANY, *Appellant*, v.
CASCADE TIMBER COMPANY *et al.*, *Respondents*.¹

SALES—CONTRACTS—CONSTRUCTION. A contract whereby one party agrees to furnish the other all the cedar logs cut by it in a specified township upon lands now owned or hereafter purchased, as such cedar logs are reached by it in its logging operations, and to deliver the logs cut to the second party at its shingle mill to be erected and located adjacent to the first party's railroad track, and the second party agrees to purchase of the first party all the cedar logs cut by it from said township as cut and delivered at said mill, and pay for same at the rate of \$5.50 per thousand feet B. M., but the price to be adjusted from time to time according to the Tacoma market, and to be at all times \$1.50 per thousand feet B. M., less than the Tacoma market price, the agreement to be in force for a period of ten years from its date, constitutes a mutual contract of sale.

SAME—CONSTRUCTION BY PARTIES. Under such a contract, where the logs supplied varied from year to year in amount, and the delivery, whether greater or less, was accepted without question, the fact that the second party erected a shingle mill for the purpose of manufacturing the logs, and that both parties had mutually performed their agreements for a period of six years, could not be construed as a construction of the contract by the parties to the effect that the first party was bound to keep the second party's mill in operation for the period named in the contract.

¹Reported in 142 Pac. 15.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 6, 1918, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Hayden, Langhorne & Metzger, for respondents.

CHADWICK, J.—This action was brought by plaintiff, as assignee of one Charles E. Hill, to recover damages for failure to deliver cedar logs under a contract, the material parts of which follow:

“Whereas Charles E. Hill of Tacoma, is about to erect a shingle mill adjacent to the tracks of the railroad owned by the Cascade Timber Company, Now Therefore, it is agreed by and between the Cascade Timber Company, a corporation, party of the first part, and said Charles E. Hill, party of the second part, as follows, to wit: The party of the first part agrees to furnish to the party of the second part all the cedar logs cut by it from township twenty-two (22) North Range eight (8) East, W. M., in King county, whether upon lands now owned by it or hereafter purchased by it, and further agrees to cut cedar logs as they are reached in the logging operations of the party of the first part in said township and to deliver the logs cut to the party of the second part on board cars at said shingle mill, which mill is to be located adjacent to the railroad track of the first party. Said first party further agrees to deliver to the second party without cost or expense to him, the cars furnished by the Northern Pacific Railway Company at the connection of said first party's track with the said Northern Pacific Railway Company's track near Kangley in King county, for the use of the said Charles E. Hill or his assigns and further agrees to haul without charge the cars loaded by the said Charles E. Hill and assigns with shingles at said mill and to deliver the said cars to the Northern Pacific Railway Company at said connection. The party of the second part agrees to purchase of the party of the first part all the cedar logs cut by the party of the first part from said township as such logs are cut and delivered on board cars at the said mill on the side track to be put in by the party of the first part and

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agrees to unload the logs from the said cars promptly as the same are delivered. The party of the second part agrees to erect and keep said mill adjacent to the track of the first party. . . . It is agreed that the party of the second part shall pay to the party of the first part for said logs at the rate of \$5.50 per thousand feet B. M. lawful money, but the price to be paid for said logs shall be adjusted from time to time according to the Tacoma market and that the price of logs delivered under this contract is to be at all times \$1.50 per thousand feet B. M. less than the market price of logs of the same quality in the Tacoma market. The price herein named or at any time fixed is to govern until request for new adjustment shall be made by either party, such new adjustment to be made promptly upon such request and when made the price fixed is to govern from the date of such request unless otherwise agreed. . . .

"It is further agreed that this agreement shall be in force for a period of ten (10) years from the date hereof. It is further agreed that this agreement shall not be assigned by the party of the second part or by his assigns except by the consent in writing first had from the party of the first part, its successors or assigns.

"In witness whereof etc. (Signed) Cascade Timber Company, By John Bagley, Vice President, Attest: E. M. Hayden, Secretary. Charles E. Hill."

After once amending its complaint, plaintiff has appealed to this court from a judgment of dismissal, entered after a refusal to plead further. The business of the Cascade Timber Company was taken over by the Northern Coast Timber Company. We shall refer to the contracting parties as appellant and respondent.

The trial judge held that the contract did not require respondent to furnish appellant any certain amount of logs, or at any particular time, or for any period of time; that it did not contract to deliver or furnish appellant with all the cedar logs that might be necessary in its business; that its engagement under the contract was no more than a promise to deliver such cedar logs as it might cut while in pursuit of its own logging operations. Counsel agree that the ques-

tion is one of interpretation. Appellant takes the position that it is our duty, in defining the relative rights of the parties, to ascertain their intent, and when found to give effect to that intent; that the language employed is to be construed in the light of the facts and circumstances existing at the time of its execution and the objects and purposes the parties had in view. 2 Page, Contracts, § 1123; *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Graham v. McCoy*, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

The duty of courts, when construing questioned contracts, to search out the intention of the parties, is well established, but that duty arises out of an ambiguity or omission that demands the reception of testimony to illustrate their intent, or to harmonize apparent conflicts. There is a presumption of finality which attends all written contracts and courts will not deliberately raise doubts or conjure ambiguities for the mere pleasure of construing them. *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 79 Wash. 361, 140 Pac. 394. Nor will the fact that a party has made a hard or improvident bargain warrant the court in binding the other party to terms raised by construction or implication.

These propositions are admitted as elementary by appellant; but it is said that the whole contract, when construed in the light of the facts and circumstances existing at the time the contract was made and the general object and purpose of the parties, demands a ruling that respondent was bound to keep appellant's mill in operation.

We need go no further than the contract. Its terms do not warrant us in holding that respondent is bound to deliver except as it conducts its own logging operations. A contract to so deliver on the one hand, and a contract to build a mill at a certain place and take the logs under such conditions as are stipulated in the contract, is not in contravention of any public policy, nor can we say, as a matter of law, that it involves a hardship and would not have been

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entered into had appellant appreciated the force of the language employed. We would have the same right to imply into the contract an understanding that appellant was mindful of the fact that the business of logging is in a sense uncertain and subject to market fluctuations and that a logger would not bind himself to deliver excepting as he could operate at a profit, as we would have to imply that appellant would not have entered into the contract unless upon an understanding that respondent would keep it in material for the continuous operation of its mill. To so imply, would lead us into difficulties which could not be measured by any rule.

At the time the contract was entered into, appellant had no established business. It did not agree to build a mill of any certain capacity nor to take any particular amount of logs. The contract is one of sale. Respondent agreed to let appellant have the cedar as it was logged with other timber, at a certain price. There is nothing, unless we go outside of the written contract, to bring the parties within the rule announced in *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 98 N. W. 459, where the court found the contract to be ambiguous and applied the rule as it relates to an established business having a certain demand for a certain amount of stock, which must have been known to the opposite party who was held to have contracted with reference thereto.

Counsel puts great reliance upon the words "the party of the second part agrees to *erect and keep said mill* adjacent to the track of the first party." They ask, why was appellant thus bound if respondent could log and deliver at will?

Respondent meets this argument, saying that it is no more than a stipulation to protect it from a call to deliver at some point away from its own tracks. Another answer might be that the words relied on are not to be singled out as the essence of the contract, but they are to be construed along with the agreement to deliver cedar logs "as they are reached in logging operations of the party of the first part."

We have discussed this phase of the case enough to demon-

strate that to receive testimony or to imply terms would but lead to confusion, whereas courts invite testimony to clear up ambiguous contracts and to make that certain which is uncertain.

Although questioned by counsel, we think the case of *Hamlyn & Co. v. Wood & Co.*, 2 Q. B. Div. (1891) 488, is in point. We agree with the observation by Lord Esher, M. R., that authorities are of little use in cases of this character, for at best they merely show that, in a particular case, an implication was or was not made. But that case more nearly touches this one than any that has been called to our attention by either party. Wood & Co., who were brewers, agreed to sell, and Hamlyn & Co., agreed to buy, all the "grains" (brewers' grains or spent malt mash) made by Wood & Co., at current rates for a period of ten years. Wood & Co., thereafter sold their business. The purchaser did not adopt the contract and suit was brought against Wood & Co., "for refusing to continue to perform the agreement, and to sell grains to the plaintiffs pursuant to the terms thereof." It was contended that

"it was an implied term of the agreement that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains under it for the period specified, and that the sale of their business was a breach of such implied term. . . ."

The judges held:

"The express contract is not that the defendants will sell the plaintiffs' grains for ten years; it is that the defendants will sell, and the plaintiffs will buy, all grains made by the defendants for ten years. What was the object of those parties as business men in entering into this agreement? The last stipulation of the contract shows that it was an advantage to the defendants to get the grains carried away from their brewery. Then what was the advantage which the plaintiffs as business men sought to gain? If the contract is construed against their contention, do they still gain something? It must be assumed that they must have thought that they would gain a profit by buying the grains at an agreed

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price; and therefore it was an advantage to them to have the right of purchasing any grains the defendants might make in preference to any other purchaser for ten years. The agreement is not that they are to pay a sum down and then to have the grains for ten years, so that, if they did not get grains for ten years, they would not get what they had paid for. That would be a different case. In that case they would have paid money for nothing, unless the implication were made that the other party had stipulated that they would not voluntarily discontinue the business during ten years. The agreement is to pay a price to be ascertained from time to time, as provided by the contract, for the quantity of grains which they from time to time obtain. Therefore, it cannot be said that, unless the implication suggested is made, they will have paid money for nothing. Such being the terms of the contract, the question is whether we can say, looking at the contract in a reasonable and business way, that it is a necessary implication that both parties contemplated an undertaking by the defendants not voluntarily to discontinue the business for ten years, at whatever loss they might carry it on, or however advantageously they might be able to sell it. It seems to me that such an implication is tremendously strong, and one which is beyond all bounds. I cannot come to the conclusion that the defendants ever contemplated such a thing, or that the plaintiffs were entitled to suppose that they did so. . . . When parties have put into writing the terms upon which they agree, more especially in the case of mercantile contracts, it is a dangerous thing lightly to imply what they have not expressed. Here it is clear that there is no breach of the contract as expressed upon the face of the written document. The written contract only amounts to an engagement by the defendants to sell to the plaintiffs all grains made by them in their business as brewers for ten years, not for a sum paid down, but at the current price, to be ascertained from time to time as provided by the agreement. . . . In this case it seems to me very reasonable to conclude from the language used, and all the circumstances of the case, that all that either party intended was that, if the defendants should carry on business for ten years, they should sell their grains to the plaintiffs at the current prices to be ascertained as mentioned in the contract. It would

have been a different thing if the contract had been to pay so much down for a supply of grains for ten years. . . . Here, if we were to imply such a contract as is suggested, we should, as it seems to me, be incurring great danger of implying something that neither party ever intended. It is enough to say that I am not satisfied that either party intended that the defendants should be bound not to sell the business for ten years. On these grounds I think that the case is not brought within the principle upon which such implications are made; and we should not be justified in adding the term suggested to the written contract."

We find in the contract before us no ambiguities calling for a resort to implied terms or conditions. Undoubtedly conditions are implied in almost every contract, but they are only indulged where necessity compels. They are employed to support consequences that are natural and not to supply matters that are the proper subject of express contract. As, for instance, if no time for performance be stated, the law will usually imply a reasonable time; if stock be sold for breeding purposes, the law will imply that it is of proper age. We have no such case here. To invoke the doctrine, we would have to create an omission and supply a condition where we are not sure the minds of the parties met upon it or that they had in mind anything that does not fall within the letter of the contract.

"There is no allegation in defendants' answer that at the time they signed the contract in question they did not know what they were signing, or that they were not fully advised as to the terms and conditions of said contract. It is a well settled principle of law that all prior negotiations of the parties are merged into a contract in writing when one is entered into covering the subject-matter of such negotiations, and we are not aware of any rule which will authorize oral proof, as to representations made before the execution of such contract, to be introduced in evidence for the purpose of contradicting or enlarging the scope of such contract, without an allegation in the pleadings that such contract was in fact signed by the party making such allegations by mistake or fraud, or without full knowledge of the conditions

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thereof. As we have seen, such allegations were entirely wanting in the case at bar and we think all representations or negotiations prior to the execution of the contract were, under the circumstances of this case, entirely immaterial, if the contract in question was unambiguous." *Staver & Walker v. Rogers*, 3 Wash. 603, 28 Pac. 906.

Nor do we find anything in the cases of *Sultan R. & Timber Co. v. Great Northern R. Co.*, 58 Wash. 604, 109 Pac. 320, 1020; *Parks v. Elmore*, *supra*; *McCartney v. Glassford*, 1 Wash. 579, 20 Pac. 423, and *Graham v. McCoy*, *supra*, that is contrary to our present holding. Holding, as we do, that there has been no breach, they have no application, unless it be the *Sultan R. & Timber Co.* case which admits the rule to be as we have found it to be, and, if an authority at all, is probably in favor of respondent, in that it holds a contract somewhat similar not to be wanting in mutuality.

Appellant did not agree to take only such logs as respondent *might* deliver. Respondent bound itself to deliver *all* the cedar logs cut in its logging operations, for which a fixed price was to be paid. The contract was mutual. This would not be doubted, we apprehend, if appellant were suing for damages for failure or refusal to deliver logs that had been cut and sold to some third party.

Finally, it is contended that the parties have put their own construction upon the contract by mutual performance for six years, and by the transfer of the contract and its approval by respondent and the agreement by appellant to "continue to be responsible for the faithful performance of said original contract, the same as if such assignment had not been made." This contention is obviously not sound. The logs supplied from year to year varied in amount. The delivery, whether greater or less, was accepted without question. To say that the parties have construed the contract to be as appellant insists, would lead to the inquiry whether they are to recover as for the greatest amount delivered in any one year, or the least amount, or an average of the

whole. We would not know how to estimate or measure the damage, and no way has been pointed out to us. It follows that the judgment of the lower court should be, and it is, affirmed.

Crow, C. J., MAIN, GOSE, and PARKER, JJ., concur.

[No. 11737. Department Two. July 23, 1914.]

CHARLES E. CORCORAN *et al.*, *Respondents*, v. POSTAL
TELEGRAPH-CABLE COMPANY, *Appellant*.¹

COMMON LAW—RULE OF DECISION. The common law is the rule of decision in the courts of the state of Washington, except where other rules may be prescribed by the constitution and statutes, because of the source of our institutions, and as further declared by legislative enactment in Rem. & Bal. Code, § 143.

DAMAGES—PUNITIVE—ALLOWANCE. Punitive damages are not recoverable in this state, even when the injury upon which the claim is rested flows from gross negligence or wilful wrong, except when expressly allowed by statute.

TELEGRAPHS AND TELEPHONES—DELAY IN TRANSMISSION OF MESSAGES—DAMAGES—MENTAL SUFFERING. Mental suffering, resulting from the negligence of a telegraph company in the delivery of a telegram entrusted to it, is not ground for the allowance of damages, in the absence of statute providing therefor, as it is governed by the common law doctrine, and does not involve its application to new conditions, not being different in principle from cases of negligent delay in conveying messages from one person to another resulting in mental suffering arising before the invention of the telegraph.

SAME—DELAY IN TRANSMISSION OF MESSAGES—DAMAGES. The award of damages in the sum of the price paid by plaintiff for the transmission of a message, which was delayed in delivery by the negligence of defendant, is not a damage so connected with plaintiff's mental suffering as to warrant the enhancement of the award by the attendant mental suffering occasioned.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered September 6, 1913, upon find-

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ings in favor of the plaintiffs, in an action for damages from failure to deliver a telegram, tried to the court. Reversed.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp (W. W. Cook, of counsel), for appellant.

McCafferty, Robinson & Godfrey (M. J. Costello, of counsel), for respondents.

PARKER, J.—The plaintiffs seek recovery of damages for mental suffering alone, independent of any physical injury or financial loss, which they allege was caused by the defendant's negligent failure to promptly deliver a telegram, sent over its lines by the plaintiff Mabel Corcoran, from Seattle, to the plaintiff Charles E. Corcoran, at St. Paul, Minnesota, informing him of the serious illness of their child. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff for the sum of \$500, from which the defendant has appealed.

The controlling facts are not in dispute, and may be summarized as follows: Respondents live in Seattle. On September 3, 1910, Mrs. Corcoran caused a telegram to be delivered to appellant at Seattle, for transmission to her husband, then absent on a visit to his parents, in St. Paul, Minnesota, reading as follows:

"Mr. Chas. Corcoran, 690 Rice Str., St. Paul, Minn. Baby very low. [Signed] Mabel."

The usual toll of seventy-five cents was then paid to appellant for the transmission of the message. 690 Rice Street, St. Paul, was the address of the home of Mr. Corcoran's parents, where he was then staying. By some error of appellant's servants, occurring in the transmission of the message, the "6" became changed to "4," so that, when it reached St. Paul, the address read "490" instead of "690," Rice street. This caused a delay in the delivery of the message to Mr. Corcoran, it being finally received by him at Seattle through the mail from his parents in St. Paul. He left St.

Paul for his home in Seattle on September 8, 1910, without having received the message or any word from his wife touching the child's condition, and upon his arrival at home in Seattle on September 11, found that his child had died and been buried a few days previous, the funeral having been delayed as long as possible. No communication passed between Mr. and Mrs. Corcoran from the time she sent the message on September 8 to the time of his arrival at home in Seattle on September 11. The mental suffering of Mr. and Mrs. Corcoran claimed to have resulted to them from the delay in the delivery of this message is the sole ground of their claim of damages in this action, except the amount of the toll paid for the transmission of the message.

There is here presented the problem: Does mental suffering, independent of injury and financial loss, resulting from mere negligent delay in the transmission and delivery of a telegram, render the company accepting such telegram for transmission and receiving pay therefor liable in damages, measurable in money, to the sender and receiver whose mental suffering results from such negligent delay? Counsel for appellant contend that there is no such liability in this state, in view of the common law, which is in force here, in the absence of controlling statutory law. We have no statute in this state relating to damages of this nature. Since the beginning of civil government in the territory now occupied by our state, the common law has been the rule of decision in our courts except where other rules are prescribed by the constitution or statutes. It has been so declared by legislative enactment. Rem. & Bal. Code, § 143 (P. C. 81 § 1). Indeed, it would necessarily be so, even in the absence of legislative declarations, because of the source of our civilization and institutions. We have, it is true, adapted the common law and its reason to new conditions as they arose, and thereby occasionally worked what may be regarded as innovations therein, when viewed superficially, but the spirit and reason of the common law have, as understood by our courts,

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always been their source of guidance when statute and constitution were silent touching the problem in hand. What, then, are the respective rights of the parties to this controversy, measured by the rule and reason of the common law as it exists here?

That mental suffering, independent of physical injury, does not, at common law, render a person who merely negligently causes such suffering answerable in damages therefor is settled by the decisions of the great majority of the states of the Union, and by an unbroken line of decisions of the Federal courts. This court indicated its adherence to this doctrine in *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883; though the application of the rule to the situation here involved was not there under examination. Nor has the application of the rule to claimed damages for mental suffering resulting from mere negligence flowing from delay in the delivery of a telegraph message ever been the subject of inquiry in this court. In *Wyman v. Leavitt*, 71 Me. 227, 229, 36 Am. Rep. 303, Justice Virgin, speaking for the court, said:

"In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows. *Prentiss v. Shaw*, 56 Maine 427; *Wadsworth v. Treat*, 43 Maine 163. Or for an assault alone, when maliciously done, though no actual personal injury be inflicted. *Goddard v. Grand T. Ry.*, 57 Maine 202; *Beach v. Hancock*, 27 N. H. 223; 2 Greene's Cr. Rep. 269. So in various other torts to property alone when the tort-feasor is actuated by wantonness or malice, or a willful disregard of others' rights therein, injury to the feelings of the plaintiff, resulting from such conduct of the defendant, may properly be considered by the jury in fixing the amount of their verdict.

"But we have been unable to find any decided case, which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can

sustain an action. And the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it. On the contrary, it has been held that a verdict, founded upon fright and mental suffering, caused by risk and peril, would in the absence of personal injury, be contrary to law. *Canning v. Williamstown*, 1 Cush. 451. So it is said (in *Lynch v. Knight*, 9 Ho. L. 577, 598) that, 'mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone.' Again, in *Johnson v. Wells*, 6 Nev. 224 (3 Am. R. 245), after a very elaborate examination, it was held that pain of mind aside and distinct from bodily suffering, cannot be considered in estimating damages in an action against a common carrier of passengers. If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the trains leaving the track, could maintain an action against the company."

That decision was rendered in 1880, and we deem it safe to assert that, up to that time, no court of any common law state or county had ever expressed a view of the common law at variance with this. We quote from this decision as authority for this doctrine as then universally recognized, not only because of its clear statement thereof, but also because, in 1881, the year following, the law was, for the first time, thought to be otherwise in telegraph cases by the supreme court of Texas, as expressed by its decision in *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, which later found a following in the courts of Kentucky, North Carolina, Alabama and Tennessee. *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880; *Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. 883, 9 L. R. A. 669; *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 South. 73; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. 864. In the case last cited, Justice Lurton, late of the supreme court of the United States, expressed views in harmony with the common law rule in a vigorous dissenting opinion, con-

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curred in by Justice Folkes. The Texas doctrine was, for a time, followed in Indiana. The Indiana court, however, has since then receded, and now adheres to the generally accepted common law rule. The common law rule has been applied and so thoroughly dealt with in telegraph cases involving delayed messages relating to sickness and death that it is unnecessary to quote from, or review, others. In *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 756, 9 South. 823, 24 Am. St. 300, 13 L. R. A. 859, the court said:

"Expressions used by the courts as argument or illustration in those cases, in which damages for mental suffering are recoverable because such suffering is declared to be inseparable from physical pain and injury, have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages.

"Damages for mental suffering have been very generally allowed in three classes of cases: (1) Where by the merely negligent act of the defendant physical injury has been sustained, and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is that the one cannot be separated from the other. (2) In actions for breach of contract of marriage. (3) In cases of wilful wrong, especially those affecting the liberty, character, reputation, personal security or domestic relations of the injured party.

"The decisions in Texas, Tennessee, Kentucky, Indiana and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not, in our opinion, sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case, decided prior to the case of *So Relle*, in which an action for breach of contract (except actions for breach of contract of marriage), or in an action

on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury.

"There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the *So Relle* case the bar had not entertained the view that an action therefor could be maintained, but there are several cases in which responsibility for mental disturbance by reason of fright has been considered.

"It has been held that fright attending an accident resulting from negligence, by which bodily injury was sustained, was properly considered by the jury in awarding damages. *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Ib. 293; *Cooper v. Mullins*, 30 Ga. 146; *Canning v. Williamstown*, 1 Cush (Mass.) 451. But where there is no bodily injury, damages for fright should not be given. *Canning v. Williamstown*, *supra*; *Railway Co. v. Coultas*, Law Rep. 13 App. Cases, 222; *Wyman v. Leavitt*, 71 Me. 227; *Lynch v. Knight*, 9 H. L. 577, 598.

"In *Flemington v. Smithers*, 2 C. & P. 292, the plaintiff sued to recover for injuries inflicted upon his minor son and servant by the negligence of the defendant, and claimed compensation for the injury to his parental feelings; but the claim was rejected.

"We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced.

"The difficulty of supplying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. 'Mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone.' *Lynch v. Knight*, 9 H. L. 577."

In *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 30 Am. St. 183, 17 L. R. A. 430, some very per-

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minent observations are made by Justice Lumpkin, speaking for the court, touching this doctrine and the seeming, but not real, exceptions thereto, as follows:

"Some of the cases rest on breach of contract; of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. . . . This view grapples with the big question, how can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? See *Walsh v. Chicago R. Co.*, 42 Wis. 23, 24 Am. Rep. 376. The answer given is, that the subject-matter of the contract is feeling, and the damage to feeling by noncompliance was plainly in contemplation of the parties making the contract. The breach of many a contract which the injured party desires performed, brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort or breach of common law or statutory duty, the contract serving merely to create the relation of duty between the parties. . . . Regarding the nature of the damages, the majority opinion in this class of decisions is that they are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is willful, wanton or malicious.

" . . . It is remarkable that the opinions declaring in favor of recovery can point to no positive authority older than the first Texas decision in 1881. They do refer to certain classes of cases where mental suffering is admitted as an element to be considered by the jury in making their estimate of the damages, namely, actions for slander or libel, for seduction, for assault without physical injury, for breach of promise of marriage, and for physical injuries. But in every one of these, it has been maintained that there is a necessary and inseparable ingredient of pecuniary injury. See *W. U. Tel. Co. v. Rogers*, *supra*. In slander and libel, where the action is founded on words not actionable *per se*, there must be proof of special damage. And where the words are actionable *per se*, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to

his social influence and business efficiency. Besides, malice (express or implied) is an essential element in such cases. In seduction, it has been necessary from ancient times for the plaintiff to prove a loss of services, or a relation from which such loss might occur, else the action could not be maintained. Thus a brother, not standing *in loco parentis*, however great his anguish and however keenly he may have felt the disgrace and mortification caused by the wrong-doer, could not recover for his mental suffering. In actions for technical assault, where no physical injury was inflicted or battery committed, damages are said by some of these authorities to be given wholly for mental suffering. Yet it may be that, the injury being essentially willful, substantial damages are given by way of punishing or making an example of the wrongdoer. An assault is an active threat against the body, an offer of violence endangering the person, which the law redresses even in its initial stage, thus protecting the physical person more completely. In actions for breach of promise, the plaintiff's financial loss plays a conspicuous part. Evidence showing the defendant's station and reputed wealth is admissible. At common law, the husband on marriage assumed the wife's debts and responsibility for her torts and for support appropriate to their station. He took a large share of her property by that event, and she acquired some rights in his property. This suffices to show that the breach of marriage promise involved important pecuniary consequences. In actions for physical injuries, the great consideration is the loss of time and the diminution of capacity for work, of course allowing also for the pain endured. So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So in cases of physical injury, the mental suffering is taken into view. But, according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered."

In *Peay v. Western Union Tel. Co.*, 64 Ark. 538, 544, 43 S. W. 965, 39 L. R. A. 463, Justice Hughes, speaking for the court, observes:

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"It will be borne in mind that the damages claimed in this case are alleged to have been caused by a breach of contract. In a majority of instances the breach of a contract merely causes disappointment, annoyance, and more or less mental trouble or distress. But it would be an unwarranted stretch of the law, in our opinion, to hold that, for mental anguish caused by violation of a contract merely, damages could be recovered in an action at law. We do not think that damages for mental pain and suffering alone can be measured by any practical or just rule. It is asked, what difference can there be between allowing damages for mental pain and anguish unattended with physical injury, and allowing damages for pain and anguish resulting from physical injury? There is this difference with us,—that damages for mental pain and anguish caused by physical injury have always been allowed by law, while damages for mental pain and anguish, unattended with physical injury, have been allowed by law only since the decision of the *So Relle* case in 1881, when the Texas court departed from the doctrine of the common law, which we think sound, and announced a new doctrine, unsupported by the authority, as we believe, of any well-considered case before it. While we do not want to be understood as clinging to ideas and doctrines that are ancient, because they are ancient merely, if they are contrary to reason and right, yet we have great respect for the conservatism of the law, and will not depart from its long and well-settled doctrines, supported by eminent authority, and founded in reason and justice.

"Even if the difference in principle between allowing damages for mental pain and anguish, the result of physical injury, and disallowing damages for such pain and anguish unaccompanied by physical injury, be such as not to be defined,—merely chimerical,—this is no reason why we should say that damages for mental anguish, independent of physical injury, should be allowed. No statute allows them in such case; the common law does not allow them; and, in our opinion, the weight of adjudication is against the right of recovery in such cases. In determining a principle in the law which, in its application, at least, seems to be new and but recently thought of, it is highly important to consider precedents, and is legitimate, in our view, to look to consequences that will follow, as certainly as night follows the day,

from the recognition of a doctrine that will affect most seriously the welfare of the people. The intolerable and interminable litigation such a doctrine would foster is beyond the reach of an ordinary imagination."

In *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 55, 40 S. E. 618, 93 Am. St. 919, 56 L. R. A. 663, it is said:

"It is conceded in nearly all of the decided cases in this country, and by the text-writers, that the general rule which has come down to us from England is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages."

In *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 261, 59 N. W. 1078, 49 Am. St. 507, 25 L. R. A. 406, Justice Mitchell, speaking for the court in his usual vigorous and convincing manner, touching the rule of the common law and its reason, said:

"The law has always been exceedingly cautious in allowing damages for mental suffering, for the manifest reasons, among others, that such damages are more sentimental than substantial, depending largely upon temperament and physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another, and there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages which are universally excluded. In no case will an action for damages lie for mental suffering caused by an act which, however wrongful, infringes no legal right of the party. In actions for a tort resulting in physical injuries, of which mental suffering forms a component part, the latter is permitted to be taken into account in the assessment of damages; and where the tort is willful, and of a character as naturally and necessarily to injure the feelings, damages for such injuries are sometimes allowed, although there was no physical injury or pecuniary loss. *Larson v. Chase*, 47 Minn. 307 (50 N. W. 238), perhaps goes as far in that direction as any case to be found in the books. In this latter class of cases such damages are often but another name for punitive damages. But we are not concerned here with the ques-

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tion when such damages may be recovered in actions of tort. We think we are warranted in asserting that the doctrine that damages for mental suffering resulting from a breach of contract is wholly unknown to and unauthorized by the common law, unless 'telegraph cases' are to be made an exception."

In the following decisions involving claims of damages resting upon mental suffering flowing from negligence in delivery of telegrams, relating to sickness and death, the holdings are in strict harmony with the views indicated by the decisions above quoted: *Russell v. Western Union Tel. Co.*, 3 Dak. 315, 19 N. W. 408; *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 546; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. 530; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 38 Am. St. 575, 20 L. R. A. 172; *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S. E. 1026; *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 57 N. W. 973, 41 Am. St. 17; *Lewis v. Western Union Tel. Co.*, 57 S. C. 325, 35 S. E. 556; *Western Union Tel. Co. v. Chouteau*, 28 Okl. 664, 115 Pac. 879, Ann. Cas. 1912 D. 824. See, also, 37 Cyc. 1775, and cases cited.

Turning, now, to the views of the Federal courts, we find the common law doctrine, as understood and universally recognized prior to 1881, adhered to without dissent in its application to claims for damages for mental suffering flowing from negligent delay in delivery of telegrams. In *Kester v. Western Union Tel. Co.*, 55 Fed. 603, ex-President Taft, then circuit judge, touching the rule and its reason, said:

"The difficulty of estimating a pecuniary compensation for mental anguish is itself a sufficient reason for the common-law rule in preventing a recovery for mental anguish in actions for simple negligence or breach of contract. The amount of litigation which would grow out of the adoption of such a rule would be intolerable. The measure of damages to be adopted would be so indefinite and so undefinable as to subject

the defendant in such cases to the possibility of great oppression. The difficulty of securing evidence as to the actual mental suffering is another reason why it could not be made the sole basis of an action. It has generally been allowed to be considered as an element in fixing damages in two classes of cases. The first is where there has been a physical injury and physical suffering of such a character that it would be difficult to distinguish between the mental and physical suffering; and the second class of cases is where the injury complained of contains an element of malice, and the damages for mental suffering are left to the jury to be fixed as a kind of punitive or exemplary damages. This case of course comes under neither head. In slander and libel, the action cannot be founded solely on mental suffering. There must be some other damage alleged before a cause of action is stated."

In *Western Union Tel. Co. v. Wood*, 57 Fed. 471, 478, 21 L. R. A. 706, Judge Pardee, presiding justice, speaking for the court of appeals for the fifth circuit, said:

"The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the *So Relle* case, 55 Tex. 308 (in 1881), and by the uniform decision of the federal courts . . .

"We have carefully considered the question presented, having been aided by able counsel orally and with elaborate briefs, and our conclusion is that upon principle, and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraphic message, as the same are too uncertain, remote, and speculative."

In the following Federal cases, all involving claims of damages of the nature here involved, the courts adhere to these views: *Chase v. Western Union Tel. Co.*, 44 Fed. 554, 10 L. R. A. 464; *Crawson v. Western Union Tel. Co.*, 47 Fed. 544; *Tyler v. Western Union Tel. Co.*, 54 Fed. 634; *Gahan v. Western Union Tel. Co.*, 59 Fed. 433; *Stansell v. Western*

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Union Tel. Co., 107 Fed. 668; *Western Union Tel. Co. v. Sklar*, 126 Fed. 295; *Rowan v. Western Union Tel. Co.*, 149 Fed. 550; *Western Union Tel. Co. v. Burris*, 179 Fed. 92.

The following decisions touching claims of damage for mental suffering unaccompanied by physical injury or wilful wrong in other than telegraph cases are equally illustrative of the common law rule and its reason: *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; *Cole v. Gray*, 70 Kan. 705, 79 Pac. 654; *Sappington v. Atlanta & West Point R. Co.*, 127 Ga. 178, 56 S. E. 311; *Mitchell v. Rochester R. Co.*, 151 N. Y. 107, 45 N. E. 354, 56 Am. St. 604, 34 L. R. A. 781; *Miller v. Baltimore & O. S. W. R. Co.*, 78 Ohio St. 309, 85 N. E. 499, 125 Am. St. 699, 18 L. R. A. (N. S.) 949; *Huston v. Freemansburg Borough*, 212 Pa. St. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Southern Telegraph Co. v. King*, 103 Ark. 160, 146 S. W. 489; *Morse v. Duncan*, 14 Fed. 396; *Wilcox v. Richmond & D. R. Co.*, 52 Fed. 264, 17 L. R. A. 804; *Kyle v. Chicago, R. I. & P. R. Co.*, 182 Fed. 618.

Are we correct in assuming that this court has not, in any of its decisions, expressed views at variance with the common law rule as understood and applied by the great majority of the courts as above indicated? Let us notice our own decisions relied upon by counsel for respondents. In *Willson v. Northern Pac. R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146, damages were claimed for injury to feelings and mental suffering flowing from the expulsion of a passenger from a car, unaccompanied by physical force or violence. Damages were allowed in that case to the passenger, but upon the theory that the act complained of was wilful and was accompanied by duress. There was in law a physical wrong committed against the person. In *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206, the plaintiff was awarded compensation for mental suffering on account of personal disfigurement resulting from a physical injury caused by the defendant. Manifestly, the mental suffering was in-

separable from the physical. This is an example of one of the most common class of cases wherein mental suffering enters into the measurement of damages. In *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802, damages were allowed the plaintiff because of the defendant's wilful expulsion of her from a public park where she had a right to be. Here, again, is an example of a wilful wrong accompanied by duress. In *Ott v. Press Publishing Co.*, 40 Wash. 308, 82 Pac. 403, damages were claimed by plaintiff because of his mental suffering flowing from the publishing of a libel against him. This, also, was a wilful wrong, the libelous words being actionable *per se*, and tending to degrade and work financial loss to the plaintiff. In *McClure v. Campbell*, 42 Wash. 252, 84 Pac. 825, damages were allowed the plaintiff for mental suffering flowing from his wrongful eviction from premises. Here, again, the action was wilful and accompanied by duress. In *Nordgren v. Lawrence*, 74 Wash. 305, 133 Pac. 436, damages were allowed for mental suffering flowing from a wrongful entry upon the plaintiff's premises, though no physical injury was inflicted upon her, but this also was a wilful wrong, inflicted upon the plaintiff by the invasion of the sacred precincts of her home. The wrongful act was a physical invasion of the plaintiff's personal rights. In *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172, the plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved. The acts were regarded by the court as wilful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights. That decision rests largely upon *Larson v. Chase*, 47 Minn.

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307, 50 N. W. 238, 28 Am. St. 370, 14 L. R. A. 85, and *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401, 61 Am. St. 273, 38 L. R. A. 413, in which states the courts recognize the full force of the common law rule as opposed to what we may term the Texas rule. In none of our own decisions have damages ever been allowed for mental suffering alone flowing from an act of mere negligence. The record of this case plainly shows that the failure of delivery of the message here involved was the result of negligence alone, which cannot be properly characterized as even gross. Nor was the wrong attended in the slightest degree by wilfulness on the part of appellant or its servants.

The problem here involved is, in no sense, one calling for the application of the common law or its reason to new conditions, as seems to be suggested by learned counsel for respondents. There is nothing new about mental suffering or the bringing it about by the actions of persons other than the sufferer himself. The negligent delay in conveying messages from one person to another, resulting in mental suffering, is no different in principle whether such message be conveyed by telegraph or other means which may have been in existence for hundreds of years. To attempt to fix a monetary value as damages for such suffering would be to enter the realm of speculation, as much today as it would have been fifty or a hundred years ago. The only possible ground upon which such damages could be allowed would be the ground upon which punitive damages are allowed. This thought is expressed in some degree in some of the decisions we have noticed, but it is worthy of note in this connection that punitive damages are not recoverable in this state even when the injury upon which the claim is rested flows from gross negligence or wilful wrong, except when expressly allowed by statute. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689; *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783; *McGill v. Fuller & Co.*,

45 Wash. 615, 88 Pac. 1038. Touching the application of the rules of the common law to new conditions, Justice Baker, speaking for the court in *Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846, said:

"Though courts should and do extend the application of the rules of the common law to the new conditions of advancing civilization, they may not rightfully create a new principle unknown to the common law nor abrogate a known one. If new conditions cannot properly be met by the application of existing laws, the supplying of needful new laws is the province of the legislative, not the judicial, department. The 'mental anguish' law, so called, was first announced in *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, decided in 1881. Telegraphy was then a comparatively new element in society; but mental anguish antedated the beginnings of the common law."

In *McBride v. Sunset Tel. Co.*, 96 Fed. 81, observations of like import were made by the court as follows:

"The only cases in which courts may legitimately take advanced grounds is when new conditions present new problems to be solved, but even then the object should be to merely accomplish the adjustment of individual rights affected by new conditions consistently with the existing laws, and leave to the legislature the task of changing, amending, or creating laws."

And in *Rowan v. Western Union Tel. Co.*, 149 Fed. 550, 553, the court said:

"To permit of the recovery of damages for mental suffering alone is not the application of old principles to new conditions, but is the creation of a new right of recovery unknown to the common law as clearly as is the creation of a right of recovery for the killing of a human being. Such right, if it is to be created, is the province of the legislature, and not of the courts."

This court has, on many occasions, felt constrained to take somewhat advanced views in adapting the common law and its reason to new conditions, but it has never felt, and does not now feel, free to change the law or its application to prob-

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lems and conditions which are in no sense new. We are bound by the rules of the common law when clearly applicable to a problem in hand, and the constitution and statutes are silent. It seems clear to us that that law and its reason calls for a reversal of this case in so far as respondents were awarded damages for their mental suffering alone.

We have not lost sight of the fact, which seems to be apparent from the record, that respondents were damaged in the sum of seventy-five cents, the sum they paid to appellant for the transmission of this message, resulting from appellant's negligence. It is suggested, but the suggestion is presented to us without citation of authorities and practically without argument, that this damage is so connected with respondents' mental suffering as to allow the award in this case to be enhanced by the mental suffering in addition to respondents' loss of the seventy-five cents paid for the transmission of the message. We are quite unable to agree with this view. Respondents' actual monetary loss is measured here with absolute certainty, by the amount they paid for the transmission of the message. That is wholly separable from the damage they suffered, if any, from mental distress. This view finds support in *International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810. We are of the opinion that respondents' mental suffering cannot be taken into consideration because of the fact that they also suffered this specific determinable money loss.

We conclude that the judgment must be reversed, and a new judgment entered, awarding to respondents damages in the sum of seventy-five cents only, together with their costs incurred in the trial court. Appellant will recover its costs upon appeal in this court.

The cause is remanded to the trial court with directions to proceed accordingly.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

[No. 11839. Department One. July 23, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v.

GEORGE V. JONES, *Appellant*.¹

SEDUCTION—CORROBORATION—EVIDENCE—ADMISSIBILITY. In a prosecution for seduction under promise of marriage, which, by the terms of Rem. & Bal. Code, § 2443, required corroborative evidence, testimony that the parties kept almost constant company with each other, to the exclusion of every one else, both before and immediately after the time of the alleged promise, is admissible, and its weight presents a question for the jury.

SAME—CORROBORATION—ATTEMPT TO PROCURE ABORTION—QUESTION FOR JURY. In a prosecution for seduction under promise of marriage, evidence of an effort to secure an abortion on the part of the accused is corroborative of the promise of marriage, and the sufficiency of evidence tending to show that fact is for the jury.

SAME—EVIDENCE—CONTINUANCE OF RELATIONS—ADMISSIBILITY. In a prosecution for seduction under promise of marriage, evidence is admissible showing that the parties kept company with each other for about six months after the seduction, as bearing on the question of consent obtained by promises.

SAME—EVIDENCE—SUBSEQUENT UNCHASTITY—ADMISSIBILITY. Evidence of a specific unchaste act of the prosecuting witness committed with a man other than accused subsequent to the alleged seduction is inadmissible as proof of unchastity, on the ground that such unchaste act may have resulted from the breaking down of maidenly modesty by the original act of seduction by the accused.

CRIMINAL LAW—TRIAL—COMMENT ON EVIDENCE. In overruling an objection to the cross-examination of a witness, who testified he had taken certain liberties with the prosecuting witness prior to the seduction, which sought to bring out that he had been telling the story about town, the comment of the court that "it is simply setting out the character of the witness," while unfortunate, cannot be deemed prejudicial, as it expresses no opinion as to the character of the witness or as to weight of his testimony.

SEDUCTION—PREVIOUS CHASTE CHARACTER—PRESUMPTIONS—INSTRUCTIONS. In a prosecution for seduction, an instruction to the jury that every female person is presumed to be of chaste character and that the burden rests upon the person calling it in question to show, by a fair preponderance of the evidence, that, at the time in

¹Reported in 142 Pac. 35.

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question, she was physically unchaste, is not erroneous on the ground that it overthrows the defendant's presumption of innocence by the counter presumption of womanly chastity.

CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—ADMISSION OF EVIDENCE. In a prosecution for seduction, the error of the court in refusing to admit questions to the prosecuting witness seeking to overthrow the presumption of her previous chastity and to affect her credibility should not be upheld merely from a hint in the record that they were excluded on account of some wrong upon the prosecuting witness, but the proper course would have been to make the offer of evidence in the absence of the jury, thus preserving a record of the motive of the court in excluding the questions so that it might be determined whether such action was justified.

WITNESSES—CROSS-EXAMINATION—SCOPE. In a prosecution for seduction, cross-examination of the prosecuting witness as to her previous unchastity, although not gone into in her examination in chief, is admissible as going to the previous chastity of the witness, which was directly in issue, and as going to her credibility.

CRIMINAL LAW—TRIAL—REFUSAL TO REOPEN CASE. The refusal of the court to reopen the case, in a prosecution for seduction after the evidence was closed, but before the jury was instructed, for the introduction of newly discovered evidence of admissions by the prosecuting witness of unchastity prior to the alleged seduction, was such an abuse of discretion as to warrant reversal, where there was nothing to indicate sharp practice on the prisoner's behalf.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 11, 1913, upon a trial and conviction of seduction. Reversed.

E. K. Brown, for appellant.

F. A. Kern and *E. Pruyn*, for respondent.

ELLIS, J.—This is an appeal from a judgment entered upon a verdict convicting the appellant of the crime of seduction. The appellant was barely eighteen years old, the prosecuting witness about six months his senior.

I. At the close of the state's evidence in chief, the appellant moved for an instructed verdict of not guilty, upon the ground that the testimony of the prosecuting witness had not been corroborated, as required by Rem. & Bal. Code, § 2443 (P. C. 135 § 381), which was in force at the time the

seduction was charged to have taken place. The appellant admits that the act of incontinence was sufficiently corroborated. He contends, however, that there was no corroboration as to the promise of marriage. The prosecuting witness testified that the seduction took place during Christmas week of 1912, and that it was induced solely by the appellant's promise to marry her, made a few days prior thereto. The appellant claimed that the first act occurred prior to December 18, 1912, and that the relation commenced and was continued for some months solely through mutual inclination, without any promise of marriage.

The corroborating circumstances relied upon by the state were of two kinds. Several witnesses testified that the appellant and the prosecuting witness kept almost constant company with each other, to the exclusion of every one else, being together almost every evening covering the period from some time in December, 1912, to March, 1913. Some of these could not say definitely just when this intimate association began, but at least one witness was quite certain that it began about the first or middle of December, 1912. Under the statute then in force, where the promise of marriage was relied upon as the seducing means, corroboration of the female as to the promise of marriage was undoubtedly necessary. In such cases, under similar statutes, it has often been held that corroboration sufficient to sustain a conviction is furnished by proof of circumstances which usually attend an engagement to marry, such as constant and exclusive attention to the female by the accused and the seeking of her society in preference to that of other women.

"The promise of marriage is not an agreement usually made in the presence or with the knowledge of third persons. Hence the supporting evidence possible in most cases, is the subsequent admission or declaration of the party making it; or the circumstances which usually accompany the existence of an engagement of marriage, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her sex, and

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all those facts of behavior toward her, which before parties to an action were admitted as witnesses in it, were given to a jury as proper matters for their consideration on that issue." *Armstrong v. People*, 70 N. Y. 38, 44.

See, also, *State v. Curran*, 57 Iowa 112, 49 N. W. 1006; *State v. McClintic*, 73 Iowa 663, 35 N. W. 696; *State v. Wycoff*, 113 Iowa 670, 83 N. W. 713. In the nature of the case, the corroborative evidence must nearly always be circumstantial. No circumstance could be more persuasive than the fact that the accused and the prosecuting witness showed a marked preference for each other's society to the exclusion of others, both before and immediately after the time of the alleged promise. The evidence referred to was admissible as corroborative of the seducing promise. Its weight was for the jury.

In April, 1913, the prosecuting witness, suspecting her condition, consulted one Dr. Harrell, who confirmed her suspicions. She told appellant of this fact, and he also consulted this same physician, and received the same information. Thereafter, the appellant informed his mother of the situation, and she, her sister, and the prosecuting witness also visited Dr. Harrell, who called in another physician, and after a physical examination, advised the three women that the girl was pregnant. The appellant's aunt testified that his mother then expressed herself as satisfied that such was the girl's condition. Shortly afterwards, the appellant's mother and aunt made an appointment to visit another physician with the prosecuting witness. The prosecuting witness testified that the mother stated that she thought this doctor would help her out. The appellant's mother at no time denied making this statement. Pursuant to this appointment, appellant's mother and aunt and the prosecuting witness visited the physician in question, and, while they were there, the appellant also came in, but there is no evidence that he took part in the conversation. The physician testified to the effect that the prosecuting witness requested him to help her

out of her predicament, which request was refused. The request, however, was made in the physician's private office, and not in the hearing of the other three. In view of the failure of the appellant's mother, when on the witness stand, to deny that this visit was inspired in the hope of procuring an abortion, and in view of the fact, also undisputed by her, that, prior to this visit, she was satisfied of the condition of the prosecuting witness, and, in view of the fact that the appellant himself visited the office of this physician at the same time that the other three participants were there, it is difficult to escape the force of this visit, under all the circumstances, as tending to show that all four of the participants therein knew and approved of the intention on the part of the prosecuting witness, if possible, to procure an abortion. Shortly afterwards, the appellant's mother and aunt made an engagement with the prosecuting witness to visit a justice of the peace. Pursuant to that engagement, the three met in the office of the justice, and the prosecuting witness there signed a release of claim upon the appellant for further liability for her unborn child, in consideration of the payment of \$50. The appellant's mother testified, as leading up to this payment, as follows:

"We called her up to find that out, to see what she wanted done, and she said that some one had told her it would take \$50 to have an operation, and that was the amount she wanted, but she wanted it with the privilege of getting more because that wasn't enough, and I told her we could not give her that much—that we didn't have it. Q. Did you give her any money to have an operation? A. No, sir, I gave it to her to help her out."

While the appellant testified that he did not know of his mother's visit to Dr. Harrell, and did not authorize any of the things done by her, his participation in the culminating visit to the other doctor was evidence tending to show that he knew of, and consented to, the other visits. He also testified that he knew nothing of his mother's visit to the justice of the peace, but admitted that he afterwards personally re-

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paid the loan which the mother made in order to secure the \$50 paid to the prosecuting witness. All of these things had a strong tendency to prove that, throughout, the mother and aunt were acting as his agents in the premises. The question was one for the jury. Counsel for the appellant admits that proof of an effort to secure an abortion on the part of the accused would be corroborative of the promise of marriage. *People v. Orr*, 36 N. Y. Supp. 398. We think this evidence, taken as a whole, had a corroborative tendency. Its weight was for the jury.

II. The prosecuting witness and several others were permitted, over appellant's objections, to testify that the appellant and prosecuting witness kept company with each other for about six months after the alleged seduction. The prosecuting witness also testified that she and the appellant continued acts of incontinence until the latter part of March, subsequent to the alleged seduction. The admission of this testimony is assigned as error. The testimony of the prosecuting witness touching the subsequent acts was admitted without objection. In any event, its admission was not error. *State v. Robertson*, 121 N. C. 551, 28 S. E. 59; *Sherwood v. Titman*, 55 Pa. St. 77. There can be no question as to the proper admission of the evidence of continued association.

"The conduct and relation of the parties after, as well as before, the date of the alleged seduction, may be shown. Such evidence is relevant to show that consent was obtained by promises and inducements and what they consisted of." Underhill, *Criminal Evidence* (2d ed.), § 388, p. 666.

See, also, 11 Enc. of Evidence, p. 698; *State v. Curran*, *supra*.

III. The court refused to permit the appellant to introduce evidence of a specific unchaste act of the prosecuting witness committed with a man other than appellant some time after the alleged seduction. It is urged that, inasmuch as the court admitted evidence of illicit relations between the

appellant and the prosecuting witness after the alleged seduction, the defense permitted should be as broad as the prosecution. This, of course, is usually true, but has no application to the case here presented. The evidence of subsequent acts of unchastity with other men should be excluded for the very reason that evidence of such subsequent acts with the accused should be admitted. The latter are admitted as tending to show a consent induced by promise of marriage, because they would probably result from the same inducing cause. The former are inadmissible because the subsequent unchaste acts with other men might result solely from the breaking down of maidenly modesty by the original act of seduction.

"Actual unchastity, i. e. criminal intimacy and lascivious conduct with other men existing after the date of the alleged seduction, is excluded as proof of the fact that prosecutrix was unchaste by the probability that it resulted from it." Underhill, *Criminal Evidence* (2d ed.), § 392, p. 672.

See, also, *Mann v. State*, 34 Ga. 1; *State v. Wells*, 48 Iowa 671; *State v. Deitrick*, 51 Iowa 467, 1 N. W. 732; *Boyce v. People*, 55 N. Y. 644.

IV. During the cross-examination of a witness for the appellant, who testified that he had taken certain liberties with the prosecuting witness prior to the alleged seduction, the prosecuting attorney sought to show that the witness had been telling the story about town. This was objected to. In overruling the objection, the court remarked, "It is simply setting out the character of the witness." It is urged that this was an improper comment upon the evidence. The court evidently made the statement for the sole purpose of explaining to counsel his reason for permitting the questions. He expressed no opinion as to the character of the witness or as to the weight of his testimony. The questions were clearly admissible upon the very ground stated by the court. While the language of the court was unfortunate, it can hardly be regarded as prejudicial. If every such remark

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of a court in the course of a long trial were held ground for reversal, it would be almost impossible to sustain a conviction in any case.

V. The court instructed the jury to the effect that it is the law in this state that every female person is presumed to be of chaste character and that when her chastity is called in question, the burden rests upon the person calling it in question to show, by a fair preponderance of the evidence, that, at the time in question, she was physically unchaste. The appellant earnestly insists that this was error. It is argued that, inasmuch as the previous chaste character of the prosecuting witness in a case of seduction is, under our statute, one of the essential elements of the crime, and, inasmuch as every person accused of crime is entitled to a presumption of innocence, therefore, the usual presumption of chastity does not exist in such cases.

In *State v. Workman*, 66 Wash. 292, 119 Pac. 751, quoting from 33 Cyc. 1482, we said:

"When the statute makes carnal knowledge of a female of previous chaste character under a specified age rape, chastity is presumed until the contrary is proved, and want of chastity in such cases must be shown by specific acts and not by general reputation. 33 Cyc. 1482."

Though the particular point here under discussion was necessarily involved in that case, the presumption of chastity was not questioned. The quotation was cited not to that point, but to the question of the character of evidence admissible to prove unchastity. The use of the quotation can hardly be termed *dictum*; neither can it be held binding upon the court on the point not there under discussion.

There is a sharp conflict of authority upon this question, but, after a most careful consideration of the subject, we believe that both the better reason and the more persuasive authorities sustain the view expressed in the above quotation. Both the presumption of chastity and the presumption of innocence are founded in prevailing experience. Chastity is the

rule; unchastity is the exception. Innocence is also the rule; guilt is the exception. These presumptions are evidential presumptions. They are both, in their last analysis, competent evidence to the point involved. If the presumption of chastity, which is only a recognition of the prevailing purity of the women of this state, and which is indulged as to womankind in many states notwithstanding the presumption of innocence, is to give way in this state to the no more reasonable and no more sacred presumption of the innocence of the accused, it ought to be only upon the strongest reasons of public policy. Such reasons do not exist. Any unchaste woman who would institute a prosecution for seduction would readily make the *prima facie* proof of prior chastity by her own testimony. The defendant would then, in any event, have to meet the *prima facie* case. The advantage of the cynical, not to say barbarous, assumption of a lack of chastity, which would cast the burden of proof in the first instance upon the state, is too slight and chimerical to weigh in the balance against the decency of the contrary assumption. Every exigency of such a case is met by the reasonable rule that these two conflicting presumptions, both of which are, in their very nature, presumptions of an evidential character, should be submitted to the jury like other conflicting evidence.

The supreme court of Iowa, in a well reasoned opinion, approving an instruction similar to that here assailed, and under a statute similar to ours, said:

"The defendant argues that, to presume in favor of the character of the woman, in this case, is to presume against his innocence. But, to our minds, this is not so. He will be presumed innocent of the fact—the act charged—whilst the presumption may be in favor of the rectitude of her character. And there seems to us no inconsistency in applying these presumptions in this manner. If the prosecution were held to show such a character, in the first instance, the lightest amount of evidence would be sufficient to make a *prima facie* case, and the burden would still be on the defendant; and there does not seem to be much weight in the argument, which

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is satisfied with this merely formal compliance with the rule, whilst, on the other hand, there is a substance in the presumption of innocence and uprightness, which requires a force of evidence to overcome. The above cited cases from New York are placed upon this same ground, applying the assumption to chastity in fact, and arguing that chastity is the general law of society, and a want of it, the exception. See *Crozier v. People*, 1 Park. Cr. R., 457. And the same argument applies with equal force to chastity of character. It does so of course. They are the same thing in substance when regarded in relation to this rule. It is our opinion that the presumption of a 'chaste character' extends to the woman in this case, and that the contrary is to be shown." *Andre v. State*, 5 Iowa 389, 398, 68 Am. Dec. 708, 712.

See, also, *State v. Burns* (Iowa), 78 N. W. 681; *State v. Drake*, 128 Iowa 539, 105 N. W. 54; *Crozier v. People*, 1 Parker Cr. Rep. (N. Y.) 453. The illogical ground of the contrary view is clearly expressed by the supreme court of Mississippi as follows:

"It remains to consider the other ground of contention on this point, which is that the previous chastity must be averred in the indictment and established in the evidence; otherwise the presumption of the defendant's innocence will be overthrown by the presumption of the woman's purity. To put it otherwise, the strength of the presumption of the defendant's innocence cannot be weakened by any counter-presumption of womanly virtue. This same view was ably urged upon our attention in the case of *Hemingway v. The State*, 68 Miss. 371. We need look no farther than the opinion we then delivered in order to silence the present contention: 'By this second proposition we suppose it is meant to be said that the presumption of innocence is affected or destroyed in part by the legal presumption of the correctness of the records, and that this favored presumption of innocence cannot be met by another presumption, but must be destroyed by positive proof. This contention rests upon the unsubstantial ground that the general presumption of innocence is irrebuttable by any other and favored presumption. The rule is, in conflicting legal presumptions, the special and favored must prevail or take precedence over the general, and the practical operation of this rule we see constantly exemplified in trials

for murder. In these trials for even capital offenses, we shall constantly find the legal presumption of malice arising from the use of a deadly weapon, and we shall see the presumption taking precedence over the general presumption of innocence, in the absence of any other evidence showing circumstances of justification or excuse for the homicide . . . But, after all, it remains to be said that . . . all that was done was to permit the jury to be informed that there was a legal presumption of the correctness of the official books, and, if this was not permissible, then it must be conceded that the presumption of innocence is irrebuttable by any other presumption . . . a proposition not to be tolerated in a court of law—for conflicting presumptions must always go to the jury as other conflicting evidence.’” *Ferguson v. State*, 71 Miss 805, 811, 15 South. 66, 42 Am. St. 492.

In *People v. Brewer*, 27 Mich. 134, 137, Judge Cooley said:

“The last error we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumptions of law should be in accordance with the general fact; and whenever it shall be true of any country that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately in our own country an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it. *Crozier v. People*, 1 Park. Cr. 457; *People v. Kenyon*, 5 Park. Cr. 286; *Kenyon v. People*, 26 N. Y. 204; *Andre v. State*, 5 Iowa 398; *People v. Millspaugh*, 11 Mich. 238. The case of *West v. The State*, 1 Wis. 217, which seems to hold otherwise, was decided upon the phraseology of the Wisconsin statute, which was thought to make ‘the previous chaste character’ of the person seduced an ingredient in the offense, to be made out by proofs. Our statute is very simple, and merely provides that, ‘If any man shall seduce and debauch any unmarried woman, he shall be punished,’ etc.—Comp. L. 1871. § 7697.”

It would seem that Judge Cooley was not favorably impressed with the view that the use of the words “previous chaste character” made any material difference. At least, he

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did not lend it the support of his approval. He merely says that in *West v. State*, 1 Wis. 217, these words were thought to be controlling. It seems to us that the courts holding that there is no presumption of chastity in such cases place too much stress upon the words "of previously chaste character," found in many of the statutes, as in ours. Rem. & Bal. Code, § 2441. The previous chastity of the female is a necessary element of the crime in the sense that it is involved in the issue, in any case.

"It is not, indeed, expressed in our statute, as it is in the statute of New York and of some of the other states that the woman should have been of previous chaste character. But it is plainly implied. The legislature never intended to send a man to the penitentiary for having had illicit connection with a prostitute or a woman of easy virtue, where she had consented, even under a promise of marriage." *Polk v. State*, 40 Ark. 482, 486, 48 Am. Rep. 17.

See, also, *Wilson v. State*, 73 Ala. 527. This is implied from the very nature of the offense, and in the term "seduce," found in many of the statutes. If the previous chastity were not an essential element of the crime, proof of its absence would be no defense. Yet, in the absence of the words "of previous chaste character" or "of good repute," a majority of the cases support the view that, in prosecutions for seduction, the chastity of the female is presumed, and that the burden is upon the defendant to show her lack of chastity, if he relies upon that defense. See note to *State v. Turner*, 82 S. C. 278, 64 S. E. 424, 17 Am. & Eng. Ann. Cas. 88; *Polk v. State* and *Wilson v. State*, *supra*; *Suther v. State*, 118 Ala. 88, 24 South. 43; *Weaver v. State*, 142 Ala. 33, 39 South. 341; *McTyier v. State*, 91 Ga. 254, 18 S. E. 140; *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856; *Tedford v. United States*, 7 Ind. Ter. 254, 104 S. W. 608; *People v. Bressler*, 131 Mich. 390, 91 N. W. 639; *People v. Brewer*, and *Ferguson v. State*, *supra*; *Flick v. Commonwealth*, 97 Va. 766, 34 S. E. 39; *Mills v. Commonwealth*, 93 Va. 815, 22 S. E. 863. We hold that the instruction was, in the main, correct.

The court should have added, however, a statement to the effect that, if there was evidence sufficient to create a reasonable doubt as to the chastity of the prosecuting witness, there could be no conviction.

VI. On cross-examination, the prosecuting witness was asked: "Who was the first person that you ever had sexual intercourse with?" Upon objection, this question was ruled out, upon the ground that it was a part of the defendant's case. She was also asked: "Did you ever have sexual intercourse with anyone before you came to Ellensburg?" To this she answered, "No, sir," when objection was made and sustained, in effect, in view of the foregoing question, striking the answer. These questions were objectionable in that they both failed to include the element of volition. They were not excluded, however, upon that ground. Had the objection been placed upon that ground, doubtless the questions would have been amended. They would then have been proper for two reasons: First, as going to the previous chastity of the witness, which was directly in issue; second, as going to her credibility. The presumption of previous chastity is, as we have seen, purely evidential in its nature. It carries no greater weight than if the prosecuting witness had testified to that effect. The rule limiting the cross-examination of a witness to things testified to in chief, therefore, does not apply. As said by the supreme court of Iowa in a similar case:

"The questions asked the witness as to her unchastity were proper upon the cross-examination. The law raises the presumption as to her chastity, and she appeared upon the stand claiming the benefit of that presumption. In accusing the prisoner of the crime she declared her own chastity. She was then in the position of one pressing the fact of her own purity as the ground of defendant's conviction, and, though she had not in words testified to that effect, yet her act in prosecuting defendant and the presumption of the law placed her in the position she would have occupied had she given such evidence. For these reasons the questions propounded by defendant were proper." *State v. Sutherland*, 80 Iowa 570, 578.

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We think the rule there announced is correct. There is some hint in the record that the court excluded these general questions on account of some wrong which had, at some previous time, been perpetrated upon the prosecuting witness. There is nothing in the record to enable us to know whether the court was justified in refusing to permit these general questions for any such reason. The proper course would have been to make the offer of the evidence in the absence of the jury, thus preserving a record of the entire motive of the court in excluding the questions. His ruling upon such an offer would have saved the appellant's rights, and, at the same time, would have permitted other questions so framed as to procure a statement from the prosecuting witness as to previous acts of unchastity, exclusive of the incident vaguely referred to in the record. There is not sufficient in the record to enable us to say that the court was justified in refusing questions of this character unless the appellant would waive the incident referred to.

Objections were also sustained to questions propounded on cross-examination of the prosecuting witness as to whether she had not admitted to another girl that she had had improper relations, prior to the alleged seduction, with a certain young man. Objection was also sustained to a question whether she had taken certain indecent liberties with another young man prior to her acquaintance with the appellant. Under the rule stated, these questions were proper cross-examination in a case of this character. In all such cases, the courts, whether indulging the presumption of prior chastity or not, hold that great latitude in cross-examination should be permitted. *People v. Abbott*, 19 Wend (N. Y.) 192; *People v. Betsinger*, 11 N. Y. Supp. 916; *Brennan v. People*, 7 Hun (N. Y.) 171; *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337; *State v. Hollenbeck*, 67 Vt. 34, 30 Atl. 696; *Benstine v. State*, 70 Tenn. 169, 31 Am. Rep. 593; *Brown v. Commonwealth*, 102 Ky. 227, 43 S. W.

214; *Creighton v. State*, 41 Tex. Crim. 101, 51 S. W. 910. The prosecuting witness had testified that the appellant had seduced her by a promise of marriage. In any view of the matter, therefore, the questions propounded were proper on cross-examination as going to her credibility. *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Workman*, 66 Wash. 292, 119 Pac. 751; *Titus v. State*, 66 Tenn. 132; *Camp v. State*, 3 Ga. 417; *State v. Murray*, 68 N. C. 31.

VII. After the evidence was closed, and before the jury had been instructed, the attorney for the appellant, in the presence of the prosecuting attorney, asked the court to re-open the case and permit one of the physicians who had formerly testified to be recalled. Appellant's attorney stated that the physician, only a few minutes before, had stopped him on the street, and informed him that, if recalled, he would testify that when the prosecuting witness was in his office about June 1, 1913, she told him that she had committed acts of incontinence with other men than the appellant at times prior to her first relations with the appellant; and that the physician stated that, up to that time, he had forgotten this circumstance. The court refused to re-open the case, to which the appellant excepted. There can be no question but that this evidence was competent and went to a vital issue in the case. There was nothing in the circumstances tending to show any sharp practice on the part of the appellant or his attorney in failing to introduce it at the proper time. While ordinarily matters of this kind are within the discretion of the trial court, it does not follow that, even in such a case, an abuse of discretion is impossible. We think, in view of the character of the charge, and the broad latitude necessarily permitted to the state in the introduction of evidence tending to support the charge, that it was an abuse of discretion to refuse to open the case for the admission of this evidence. *Schonberger v. Commonwealth*, 86 Va. 489, 10 S. E. 713; *Dickinson v. State*, 3 Okl. Cr. 151, 104

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Pac. 923; *Etly v. Commonwealth*, 130 Ky. 723, 113 S. W. 896.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

Crow, C. J., MAIN, Gose, and CHADWICK, JJ., concur.

[No. 11765. Department Two. July 27, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v.

MATTIE T. PAYSSE, *Appellant*.¹

LIBEL AND SLANDER—CRIMINAL PROSECUTION—MALICE—PRESUMPTIONS—STATUTES—CONSTRUCTION. Where the slander was not justified, it is presumed that the words were maliciously spoken, in a prosecution under Rem. & Bal. Code, § 2433, defining malicious slander impairing the reputation for chastity of a female over twelve years of age, and providing that every such slander shall be deemed malicious unless justified by the fact that the language used is true and fair and spoken with good motives.

SAME—CRIMINAL PROSECUTION—EVIDENCE—CORROBORATION—NECESSITY—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2434, providing that a conviction for slander of a woman impairing her reputation for chastity cannot be had upon the testimony of the woman slandered unsupported by other evidence, corroboration is only necessary of the facts constituting the gravamen of the offense, so that the testimony of the prosecutrix tending to show that she was entitled to the protection of the statute need not be corroborated.

APPEAL—BRIEFS—ASSIGNMENT OF ERRORS. It is discretionary to allow errors to be assigned in a supplemental brief which were not mentioned in the principal brief on appeal.

CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—REVIEW. Upon appeal in a criminal case, error cannot be assigned upon the introduction of evidence to which no objection was made below.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 20, 1913, upon a trial and conviction of criminal slander. Affirmed.

¹Reported in 142 Pac. 3.

Gill, Hoyt & Frye, Reed & Hardman, and Hughes, McMicken, Dovell & Ramsey, for appellant.

John F. Murphy and *S. H. Steele*, for respondent.

FULLERTON, J.—The appellant was convicted in a justice court of King county of the statutory misdemeanor defined in Rem. & Bal. Code, § 2433 (P. C. 135 § 361). She appealed from the judgment of conviction to the superior court of King county, where she was again tried and again convicted of the same offense, and sentenced to pay a fine of \$50. From the last mentioned conviction, she appeals to this court.

The appeal was taken and perfected in this court by counsel who represented her on the trial in the superior court. They have filed a brief assigning error only on the giving of certain instructions, and on the refusal of the court to give a certain requested instruction. After the appeal had been perfected and the brief filed, the appellant employed new counsel to represent her, causing them to be substituted in the place and stead of her original counsel. Her new counsel have filed a supplemental brief and additional assignments of error, assigning that the court erred in the admission of certain testimony. The questions suggested for reversal, we will notice in order.

The statutes upon which the appellant was convicted read as follows:

“§ 2433. Every person who, in the presence or hearing of any person other than the female slandered, whether she be present or not, shall maliciously speak of or concerning any female of the age of twelve years or upward, not a common prostitute, any false or defamatory words or language which shall injure or impair the reputation of any such female for virtue or chastity or which shall expose her to hatred, contempt or ridicule, shall be guilty of a misdemeanor. Every slander herein mentioned shall be deemed malicious unless justified, and shall be justified when the language charged as slanderous, false or defamatory is true and fair, and was spoken with good motives and for justifiable ends.”

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"§ 2434. No conviction shall be had under the provisions of the preceding section of this act, upon the testimony of the woman slandered unsupported by other evidence."

In its charge to the jury, the court, after defining the issue between the state and the appellant, charged them, in substance, that the only question for them to consider was whether or not the appellant had spoken of and concerning the prosecuting witness the slanderous words substantially as they were set out in the complaint; that, if they so found, they would find the accused guilty, and if they did not so find, they would find her not guilty. It is objected to the instruction that it omits the element of malice which the statute makes an ingredient of the offense; the argument being that the jury could not find the defendant guilty unless they found not only that the accused spoke of and concerning the prosecuting witness the slanderous words, but that they must also find that she spoke them maliciously.

But we think the argument overlooks the concluding sentence of the section of the statute defining the offense. It is there provided that every slander mentioned in the statute shall be deemed to be malicious unless justified, and shall be justified when the language charged as slanderous, false or defamatory is true and fair, and was spoken with good motives and for justifiable ends. Here there was no justification or attempted justification of the speaking of the slanderous words, either in the evidence on part of the state or of that on the part of the defendant. The state, after introducing its preliminary proofs, introduced evidence tending to show the speaking of the slanderous words. The appellant contented herself with a denial that she had spoken them. In such a case, the question of malice is not involved. It is presumed from the mere speaking of the slanderous words. The court, therefore, was not required to instruct nor justified in instructing, that the jury must find, as a matter of fact, that the slanderous words were spoken maliciously.

The appellant requested the court to charge the jury that

Gill, Hoyt & Frye, Reed & Hardman, and Hughes, McMicken, Dovell & Ramsey, for appellant.

John F. Murphy and S. H. Steele, for respondent.

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In its charge to the jury, the court, after defining the issue between the state and the appellant, charged them, in substance, that the only question for them to consider was whether or not the appellant had spoken of and concerning the prosecuting witness the slanderous words substantially as they were set out in the complaint; that, if they so found, they would find the accused guilty, and if they did not so find, they would find her not guilty. It is objected to the instruction that it omits the element of malice which the statute makes an ingredient of the offense; the argument being that the jury could not find the defendant guilty unless they found not only that the accused spoke of and concerning the prosecuting witness the slanderous words, but that they must also find that she spoke them maliciously.

But we think the argument overlooks the concluding sentence of the section of the statute defining the offense. It is there provided that every slander mentioned in the statute shall be deemed to be malicious unless justified, and shall be justified when the language charged as slanderous, false and defamatory is true and fair, and was spoken with good motives and for justifiable ends. Here there was no justification or attempted justification of the speaking of the slanderous words, either in the evidence on part of the state or on that on the part of the defendant. The state, after introducing its preliminary proofs, introduced evidence tending to show the speaking of the slanderous words by the appellant, and with a denial that she had any malicious motive in so doing. The question of malice is not a question of fact. In speaking of the slanderous words, the jury is not required to find that the appellant had any malicious motive. The jury must find that the words were spoken with a malicious motive. If the jury find that the words were spoken with a malicious motive, the court should instruct the jury that

Gill, Hoyt & Frye, Reed & Hardman, and Hughes, McMicken, Dovell & Ramsey, for appellant.

John F. Murphy and S. H. Steele, for respondent.

FULLERTON, J.—The appellant was convicted in a justice court of King county of the statutory misdemeanor defined in Rem. & Bal. Code, § 2433 (P. C. 135 § 361). She appealed from the judgment of conviction to the superior court of King county, where she was again tried and again convicted of the same offense, and sentenced to pay a fine of \$50. From the last mentioned conviction, she appeals to this court.

The appeal was taken and perfected in this court by counsel who represented her on the trial in the superior court. They have filed a brief assigning error only on the giving of certain instructions, and on the refusal of the court to give a certain requested instruction. After the appeal had been perfected and the brief filed, the appellant employed new counsel to represent her, causing them to be substituted in the place and stead of her original counsel. Her new counsel have filed a supplemental brief and additional assignments of error, assigning that the court erred in the admission of certain testimony. The questions suggested for reversal, we will notice in order.

The statutes upon which the appellant was convicted read as follows:

“§ 2433. Every person who, in the presence or hearing of any person other than the female slandered, whether she be present or not, shall maliciously speak of or concerning any female of the age of twelve years or upward, not a common prostitute, any false or defamatory words or language which shall injure or impair the reputation of any such female for virtue or chastity or which shall expose her to hatred, contempt or ridicule, shall be guilty of a misdemeanor. Every slander herein mentioned shall be deemed malicious unless justified, and shall be justified when the language charged as slanderous, false or defamatory is true and fair, and was spoken with good motives and for justifiable ends.”

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Opinion Per FULLERTON, J.

“§ 2434. No conviction shall be had under the provisions of the preceding section of this act, upon the testimony of the woman slandered unsupported by other evidence.”

In its charge to the jury, the court, after defining the issue between the state and the appellant, charged them, in substance, that the only question for them to consider was whether or not the appellant had spoken of and concerning the prosecuting witness the slanderous words substantially as they were set out in the complaint; that, if they so found, they would find the accused guilty, and if they did not so find, they would find her not guilty. It is objected to the instruction that it omits the element of malice which the statute makes an ingredient of the offense; the argument being that the jury could not find the defendant guilty unless they found not only that the accused spoke of and concerning the prosecuting witness the slanderous words, but that they must also find that she spoke them maliciously.

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The appellant requested the court to charge the jury that

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John F. Murphy and *S. H. Steele*, for respondent.

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Opinion Per FULLERTON, J.

“§ 2484. No conviction shall be had under the provisions of the preceding section of this act, upon the testimony of the woman slandered unsupported by other evidence.”

In its charge to the jury, the court, after defining the issue between the state and the appellant, charged them, in substance, that the only question for them to consider was whether or not the appellant had spoken of and concerning the prosecuting witness the slanderous words substantially as they were set out in the complaint; that, if they so found, they would find the accused guilty, and if they did not so find, they would find her not guilty. It is objected to the instruction that it omits the element of malice which the statute makes an ingredient of the offense; the argument being that the jury could not find the defendant guilty unless they found not only that the accused spoke of and concerning the prosecuting witness the slanderous words, but that they must also find that she spoke them maliciously.

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Opinion Per FULLERTON, J.

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John F. Murphy and *S. H. Steele*, for respondent.

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The appellant requested the court to charge the jury that

all of the facts charged in the complaint must be corroborated by the testimony of a person other than the female alleged to have been slandered. The court declined to so charge, and its refusal so to do constitutes the second error assigned. The statute, it will be observed, is somewhat general in its language; it provides that no conviction shall be had upon the testimony of the woman slandered unsupported by other evidence, but does not define the nature or character of the supporting evidence, or the extent to which it shall go. The general rule applicable to supporting or corroborative evidence is that it is sufficient if it extends to those facts which constitute the gravamen of the offense; those facts which tend to connect the defendant with the commission of the offense. Evidence of the female going to matters of inducement, and matters of description designating the qualifications which the female slandered must possess at the time of the commission of the offense in order to enable her to invoke the protection of the statute, need not be supported or corroborated. *State v. Aton*, 67 Wash. 485, 121 Pac. 980; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Harvey v. Territory*, 11 Okl. 156, 65 Pac. 837; *Williams v. State*, 59 Tex. Cr. 347, 128 S. W. 1120; *State v. Meister*, 60 Ore. 469, 120 Pac. 406.

In *Kenyon v. People*, *supra*, this language was used:

"The statute provides 'that no conviction shall be had on the testimony of the female seduced, unsupported by other evidence.' It was claimed by the defendant's counsel that no conviction could be had unless the prosecutrix was supported by other evidence, not only as to the promise and illicit intercourse, but also as to the facts of her being unmarried, and her previous chaste character. The judge, however, in substance, instructed the jury that no corroboration or support was necessary as to her being unmarried, or as to her chastity. On the point of her being 'unmarried' she was abundantly supported by other evidence; but as to her previous chastity, there was no affirmative testimony, as there could not well be, except her own. But the judge was right in his construction of the statute. It does not contemplate

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that the female shall be supported or corroborated upon every material fact alleged. It is enough if the support extends to those facts which go to prove the offense charged. No corroboration or support is necessary to the points which merely indicate the person to be protected by the statute, viz.: that she was an unmarried female and of previous chaste character. It was only necessary that she should be supported by direct evidence or proof of circumstances, as to the facts constituting the crime. These were the promise and the intercourse."

In the case before us, the prosecuting witness testified to no fact tending to connect the appellant with the commission of the offense charged against her. Her testimony went no further than to show that she was a person entitled to the protection of the statute. She testified that she was a woman over the age of twelve years, and was not a common prostitute. The testimony tending to connect the appellant with the commission of the offense was given in evidence by the persons to whom and in whose presence the slanderous words were spoken. Under the rule above cited, the prosecuting witness did not have to be supported or corroborated by other evidence upon the facts to which she testified; and hence the instruction, if given in the form requested, would have been misleading and confusing. The evidence presented did not call for an instruction on the question of supporting evidence, and there was no error in the refusal of the court to instruct upon that question.

The errors assigned and discussed in the second or supplemental brief relate to evidence of slanderous words spoken of and concerning the prosecuting witness, of the same nature as those charged in the complaint, to other persons at different times and places from those charged in the complaint. This evidence was introduced in rebuttal for the purpose of impeaching the appellant, after she had specifically denied speaking the slanderous words. The state objects to the consideration of these assignments in the court on two grounds; first, because the assignments come too late, having been

made after the appeal had been taken and perfected on other grounds, and after the time for taking a second appeal had expired; and second, because no objection was taken to the introduction of the evidence in the court below. The first part of the objection is not well taken. The appeal from the judgment below was properly perfected in this court, and it is within the discretion of the court to allow errors to be urged before it in a supplemental brief although not mentioned or assigned in the principal brief on the appeal. But perhaps this question is not very material, since we find the second ground well taken. It is a principle, applicable to criminal as well as civil cases, that objections to evidence or matters or proceedings occurring at the trial, not going to the jurisdiction of the court, must be presented to and ruled upon by the trial court before they can be made available upon appeal. As was said by the court in *State v. Tamlar*, 19 Ore. 528, 25 Pac. 71, 9 L. R. A. 853:

“As this is an appellate tribunal, constituted to revise and correct the errors committed by the trial court, it is only when that court has acted, and the act is claimed to be error and disclosed by the record, that such error becomes the subject of our power and duties.”

See, also, *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

The judgment is affirmed.

CROW, C. J., MOUNT, PARKER, and MORRIS, JJ., concur.

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Statement of Case.

[No. 11816. Department Two. July 27, 1914.]

**KLINE BROTHERS & COMPANY, *Respondent*, v. NORTH COAST
FIRE INSURANCE COMPANY, *Appellant*.¹**

EVIDENCE—PRESUMPTIONS—JUDGMENT. It is presumed, in the absence of evidence to the contrary, that the judgment of a court of general jurisdiction is regular, and its recitals are *prima facie* evidence of the facts therein stated.

INSURANCE—POLICY—PLACE OF EXECUTION AND DELIVERY. A contract of insurance was made, executed, and delivered in the state of New York, where an insurance company of this state furnished blank contracts to its agent in New York authorized to issue the contract and countersign and make it valid, and to collect the premium and deliver the policy, all of which it did in the state of New York.

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—RIGHT TO MAINTAIN. Under N. Y. Civ. Code of Procedure, § 1780, providing that a foreign corporation may maintain an action against another for breach of a contract made within the state of New York, the courts of that state have jurisdiction of an action between foreign corporations upon a policy of insurance issued, executed and delivered in the state of New York.

JUDGMENT—ACTIONS—BURDEN OF PROOF. Where a judgment of a court of general jurisdiction in a foreign state recited an appearance on behalf of the defendant, it is necessary for the defendant to show that the attorney making the appearance did so without authority.

JUDGMENT—FOREIGN JUDGMENT—ACQUIESCENCE—ATTORNEY AND CLIENT—APPEARANCE—AUTHORITY. Where, in an action against a foreign corporation, the service on its agent was good, and the defendant had notice of the pendency of the action, and that a certain attorney was appearing for it, but did nothing to renounce the appearance or to prevent a threatened default which the attorney suffered because of nonpayment of his fees, the appearance was authorized by acquiescence, and the default judgment was valid.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered September 13, 1913, upon findings in favor of the plaintiff, in an action upon a foreign judgment, tried to the court. Affirmed.

McBurney & O'Connor, for appellant.

J. H. Ballinger and *H. C. Force*, for respondent.

¹Reported in 142 Pac. 7.

MOUNT, J.—This action was brought by the plaintiff to recover upon a judgment entered by the supreme court of the state of New York. Upon trial of the case in the court below a judgment resulted in favor of the plaintiff. The defendant has appealed.

The facts are as follows: The plaintiff is a corporation organized under the laws of the state of Florida. The defendant is a corporation organized under the laws of this state, and is engaged in the general fire insurance business. In the year 1908, it was engaged in writing what is known as "affidavit" or "surplus line insurance" in Eastern states. It had authorized the Eastern General Agency, Incorporated, a corporation in the city and state of New York, to solicit and write insurance for the defendant corporation. The defendant was not required by the laws of the state of New York to be admitted or licensed to do business in that state in order to write this line of insurance. This affidavit or surplus line insurance was described by one of the witnesses as follows:

"Affidavit insurance is insurance on a risk where the admitted companies have their limit, and if the assured desires more insurance he must file an affidavit with the insurance department of the state of New York requesting additional insurance in non-admitted companies, and that insurance must be procured through an agent who is licensed in the state of New York to do that business."

No question is made that the Eastern General Agency, Inc., was authorized to write this line of business in New York. It is conceded that the Eastern General Agency, Inc., was authorized by the defendant to issue its policies in New York and deliver them there to the insured. It was the practice of the defendant to furnish to this agency blank insurance policies with printed authentications by the officers of the company; and the Eastern General Agency, Inc., when an application was made for a policy, would write the policy, countersign the same, collect the premium, and deliver the policy to the assured.

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On the 28th day of August, 1908, Kline Bros. & Company, the plaintiffs in this action, applied to the Eastern General Agency, Inc., through its broker, for \$1,000 surplus line insurance on a certain stock of tobacco located in the state of Florida. The policy was issued, the premium was paid, and the policy was delivered to the plaintiff, or to its agent. Afterwards, and while the policy was in force, the property was destroyed by fire. Proofs of loss were made to the company, and subsequently an action was brought upon the policy against the defendant in the supreme court of the state of New York. Service was made upon the president of the Eastern General Agency, Inc., in the state of New York. No return of this service, however, was made. The president of the Eastern General Agency, Inc., requested one Raphael, an attorney at law, to appear in said action. Mr. Raphael entered his appearance in the case and filed a demurrer to the complaint, which demurrer was sustained. Subsequently an amended complaint was filed. Thereupon an answer was filed by Mr. Raphael. Subsequently, on June 2, 1910, Mr. Raphael sent a bill for a portion of his fees and expenses to the defendant at Seattle, the home office of the defendant company. The defendant received this statement, but made no reply thereto. Afterwards, on March 4, 1911, Mr. Raphael again sent a letter to the defendant stating that it had neglected to pay his bill for retainer and expenses, and insisted that, unless they responded to his communication, he would take no further steps in their behalf, but would suffer a default to go against the defendant. The defendant made no further appearance in the action; and when the case came on for trial, a judgment for the amount prayed for was entered by the supreme court of the state of New York against the defendant. The judgment recited an appearance on behalf of the defendant. Afterwards this action was brought in this state upon the judgment.

It is contended by the appellant, first, that the court erred in holding that the New York court had jurisdiction of the

case in which the judgment was obtained; second, that the trial court erred in holding that the appellant had appeared in the action in the state of New York; and third, that the trial court erred in holding that the judgment secured in the state of New York was a valid judgment against the appellant. We shall notice these positions in the order named.

It is apparently conceded upon the record that the supreme court of New York is a court of general jurisdiction. The burden, therefore, of proving that that court had no jurisdiction of the action was upon the appellant, because the presumption is, in the absence of evidence to the contrary, that the judgment of a court of general jurisdiction is regular, and the recitals in such a judgment are *prima facie* evidence of the facts therein stated. *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. 877; *Aultman, Miller & Co. v. Mills*, 9 Wash. 68, 36 Pac. 1046; *Willey v. Nichols*, 18 Wash. 528, 52 Pac. 237.

It is argued by the appellant that, under the conceded facts, the supreme court of New York was without jurisdiction by reason of the fact that the contract was not a New York contract. Section 1780 of the New York Code of Civil Procedure provides as follows:

" . . . An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract made within the state . . ."

It is argued by the appellant that this contract was either a contract made in the state of Washington, or in the state of Florida, because apparently the contract was to be performed in the state of Florida upon property located in that state. But we think this does not necessarily follow. It is conceded by the appellant that an action upon an insurance policy is transitory in its nature. It is true that the goods upon which the policy was issued to the insured were located in the state of Florida. It does not necessarily follow that the

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contract was to be performed there. At any rate, the statute of New York above quoted gives the courts of that state jurisdiction in cases where there is a breach of a contract made within the state. We are satisfied from the conceded facts in this case that this was clearly a contract made within the state of New York. As stated above, the agent of the appellant in the state of New York was authorized to issue the contract. That agent was furnished by the appellant with blank contracts to be issued, either upon property in the state of New York, or in any other state. This agent in New York was authorized to countersign the policy and make it valid. This was done. This agent in New York was authorized to collect the premium and to deliver the policy to the assured. This was done. In short, it is too plain for argument that the contract of insurance was made, executed, and delivered in the state of New York. Clearly, therefore, under the New York statute, the courts of general jurisdiction of that state had jurisdiction over the subject-matter of the action. *Armour v. Sound Shore Front Imp. Co.*, 71 Misc. 253, 128 N. Y. Supp. 331.

It is next argued that the court erred in holding that the appellant appeared in the action in the state of New York. It is conceded that Mr. Raphael appeared in the case on behalf of the appellant. The evidence is not clear that the Eastern General Agency, Inc., had authority to employ an attorney in the case. But, under the rule above stated, to the effect that recitals in the judgment must be overcome by the party attacking the judgment, it follows that it was necessary for the appellant to show that Mr. Raphael was not authorized to appear in that case. We think this rule has not been met in this case. It is true, the president of the Eastern General Agency, Inc., testified that he had no recollection of employing Mr. Raphael in that particular case. Yet he testified that he authorized him to appear in a number of cases arising out of this particular risk. But whether the president of that company employed Mr. Raphael or not, we

are satisfied the service was good upon the president of the New York company, and the appellant had notice of the fact of service and the pendency of the action long prior to the time the judgment was entered. The judgment was entered on April 24, 1911. On June 2, 1910, the appellant was notified that Mr. Raphael was appearing in the action in its behalf. And on March 4, 1911, the appellant was again notified of that fact, and that unless it paid the fees of Mr. Raphael he would suffer a default against the appellant in the New York case. So it is plain that, whether the New York agency was authorized to employ Mr. Raphael or not, the appellant had notice of the fact that Mr. Raphael was appearing in the case. They had notice of the fact that the case was pending in New York, and after being informed of these facts, they did nothing to renounce the appearance, but in their silence acquiesced therein. The appellant cannot now be heard to say that the appearance was unauthorized. We are satisfied that, under all the facts in the case, the appearance was authorized both by the Eastern General Agency, Inc., by direct request, and by the appellant by acquiescence.

From what we have said on the first two points, it follows that the judgment entered in the state of New York was a valid and subsisting judgment.

The judgment appealed from is therefore affirmed.

CROW, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

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Opinion Per MORRIS, J.

[No. 11846. Department Two. July 27, 1914.]

THOMAS J. CUSHMAN, *Respondent*, v. MERRILL CUSHMAN,
Appellant.¹

MARRIAGE—VALIDITY—ANNULMENT—INFANTS—AGE OF CONSENT—STATUTES—CONSTRUCTION. The common law age of consent to marry, of 14 years for males and 12 for females, is not changed by Rem. & Bal. Code, § 7150, providing that marriage is a civil contract that may be entered into by males of the age of 18, and § 7162, authorizing the annulment of a marriage if either party was incapable of consenting thereto for want of legal age, and § 7164, providing for licenses to marry when under age upon the written consent of the parents, if the female be over fifteen years of age; since the statute permitting marriage was only cumulative of the common law and nowhere prohibits the marriage of minors, or changes the common law rule, and since the regulations as to the issuance of licenses do not affect the marriage status, and the requirement of parental consent recognizes that infants are capable of giving their own consent, under common law rules (MOUNT, J., dissenting).

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 23, 1913, upon findings in favor of the plaintiff, in an action to annul a marriage, tried to the court. Reversed.

Longfellow & Fitzpatrick, for appellant.

Revelle, Revelle & Revelle, for respondent.

MORRIS, J.—The parties to this action were married July 3, 1913, the respondent being then eighteen, and appellant seventeen, years of age. Both parties at the time of this marriage were apparently of full age, respondent being a strong, robust appearing young man, six feet tall, and weighing one hundred and seventy pounds. The marriage was without the knowledge or consent of the parents of either of the parties. Respondent, at the time of the issuance of the license, produced a witness who made the required affidavit that both of the parties were of full age. It was agreed that the marriage

¹Reported in 142 Pac. 26.

should be kept a secret from the respective parents, and this agreement was kept until July 28, when respondent's parents were informed of the marriage, appellant's parents having learned of it a few days previous. The marriage was fully consummated, and as a result thereof the appellant became pregnant, but suffered a miscarriage before the case came on for trial below. On August 1, respondent commenced this action, seeking an annulment of the marriage upon the ground that he was under legal age at the time of the marriage and had not the written consent of his parents. The lower court made findings from which we quote:

"That said marriage is void for the reason that the plaintiff at the time of the issuance of the marriage license and on the date on which he and the plaintiff were united in marriage was not of legal age, he being then of the age of eighteen years, and for the further reason that said marriage license was issued and said marriage contract entered into between the plaintiff and defendant without the consent of plaintiff's parents or either of them."

Upon this finding, a decree of annulment was based. The soundness of this decree is to be determined from the proper construction given some of our statutes relating to marriage, particularly Rem. & Bal. Code, §§ 7150, 7162, and 7164 (P. C. 329 §§ 1, 3, 37). These statutes are as follows:

"§ 7150. Marriage is a civil contract which may be entered into by males of the age of twenty-one years, and females of the age of eighteen years, who are otherwise capable."

"§ 7162. When either party to a marriage shall be incapable of consenting thereto, for want of legal age or a sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed."

"§ 7164. The county auditor, before a marriage license is issued, upon the payment of a license fee of two dollars, shall require each applicant therefor to make and file in his office upon blanks to be provided by the county for that pur-

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pose, an affidavit showing that such applicant is not feeble-minded, an imbecile, epileptic, insane, a common drunkard, or afflicted with pulmonary tuberculosis in its advanced stages: Provided, that in addition, the affidavit of the male applicant for such marriage license shall show that such male is not afflicted with any contagious venereal disease. He shall also require an affidavit of some disinterested credible person showing that neither of said parties is an habitual criminal, and that the female is over the age of eighteen years and the male is over the age of twenty-one years: Provided, that if the consent in writing is obtained of the father, mother, or legal guardian of the person for whom the license is required, the license may be granted in cases where the female is under the age of eighteen years, or the male is under the age of twenty-one years: Provided, that no consent shall be given, nor license issued, unless such female be over the age of fifteen years. Such affidavit may be subscribed and sworn to before any person authorized to administer oaths. Anyone knowingly swearing falsely to any of the statements contained in the affidavits mentioned in this act shall be deemed guilty of perjury and punished as provided by the laws of the state of Washington."

To support the decree, it must be held that, within the meaning of § 7162, incapacity of consent for want of legal age means males under twenty-one and females under eighteen; and that, by § 7150, the common law age of consent has been raised to twenty-one years in males and eighteen in females. In our opinion, such is not the proper construction of these statutes. It is difficult to discover how § 7150 in any wise changed the rule of the common law, or made the law otherwise than it would have been had no such statute been enacted. To declare that marriage is a civil contract adds nothing new to the law as it existed prior to the enactment of this statute, nor is any new privilege extended in permitting males of twenty-one and females of eighteen to enter the marriage relation, since under our law, Rem. & Bal. Code, § 8743 (P. C. 69 § 1), males become of full age at twenty-one and females at eighteen for all contractual purposes, and require no permissive statute to render them competent to

enter the marriage state when they reach the age of twenty-one and eighteen respectively, and such had been the law in this territory for twelve years prior to the enactment of § 7150. This statute was originally §§ 1 and 5 of the act of 1854, p. 404, regulating marriage, and as then enacted read as follows:

“§ 1. That marriage is declared to be a civil contract.”

“§ 5. Males under the age of twenty-one and females under the age of eighteen shall not be joined in marriage without the consent of parents or other persons under whose government such minor may be.”

The act of 1854 was amended in 1866, p. 81, § 1 of that act being § 7150 as we now have it, while § 5 was left out of the amendatory act, which provided for the issuance of a marriage license in all cases and prohibited the issuance of such license if the female was under the age of sixteen and the male under the age of twenty-one, without the consent of parents or guardian. This last section contained this proviso:

“But if either of the parties being of an age capable of contracting marriage have no parents or guardian resident within this territory, and the female has resided within this territory for a period of three months next preceding such application, the license may issue if otherwise proper without the consent mentioned in this section;”

the difference between these two acts being that the act of 1854 prohibited the marriage of males under twenty-one and females under eighteen without the consent of parents or guardian, while the act of 1866 prohibited the issuance of a license to males under twenty-one or females under the age of sixteen without the consent of parents or guardian. The proviso of the latter act was a plain recognition that infants were capable of contracting marriage, and there being no limitation as to the age of such capacity, we must find such limitation in the common law rule of twelve and fourteen years. This section was amended in 1867 by raising the age

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of the female to eighteen years and leaving out the proviso. This continued to be the law until the act of 1909, when these sections were again amended, appearing as they now read. Section 8743, fixing the age of majority of both males and females as it now exists, was enacted in 1854. So that, when in 1866 the legislature declared that males of twenty-one and females of eighteen years of age were eligible to matrimony, it made no new provision in the law of the then territory, for it had been the law since 1854 that males of twenty-one and females of eighteen were of age for all contractual purposes, including matrimony. None of these sections prohibits the marriage of minors; nor do they attempt to fix the age when minors shall become capable of marriage; nor do they in any way change the common-law rule of consent from fourteen in males and twelve in females. In this respect, our law is analogous to the Iowa statute, which provides that males of eighteen years and females of fourteen years may be joined in marriage, which statute was held to be merely cumulative and not to abrogate the common law rule fixing the age of marriage consent at fourteen for males and twelve for females. In so holding, it was said, in *Goodwin v. Thompson*, 2 G. Greene (Iowa) 329:

"Statutes will not be construed to have an effect beyond that which is to be gathered from the plain and direct import of the terms used in declaring them. Effect by implication, will not be given to them, so as to change a well established principle of the common law. The act regulating marriages within this state, merely declares what description of persons 'may be joined in marriage,' . . . There is no prohibition of the marriage of a minor, who may be under fourteen years of age, expressed. The statute is merely cumulative in its operation, and cannot have the effect of repealing the common law, so as to render the contract void. Such has been the decision of this court, as well as the courts of last resort in nearly all the states of the union, in declaring the effect of statutes similar to ours."

So in our statute, there is no prohibition against the marriage of males under the age of twenty-one, nor of females

under the age of eighteen. For it cannot be said that, because a statute permits persons of full age to contract marriage, persons of less than full age may not. There is neither a direct inhibition nor, as was said in the Iowa case, will such effect be given by implication so as to change the well established principle of common law. The right of marriage existed at common law in males of twenty-one and females of eighteen, and this statute, being merely cumulative or supplementary to the common law, does not displace that law any further than is clearly necessary. Black, Interpretation of Laws, p. 363.

Neither is respondent's contention aided by § 7162, as this section does not attempt to fix the age at which either males or females are capable of consenting; and since it does not, we must look to the common law to find at what age such capacity is fixed. Here, again, we find a distinction between the law of this state and that of others from which respondent cites authorities. Wisconsin has a statute, cited in *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568, providing that, when either of the parties to a marriage shall be incapable of consenting thereto for want of age, the marriage shall be void. But in determining when such incapacity arises because of lack of age, this statute is aided by § 2329 of the Revised Statutes of Wisconsin, providing that:

"Every male person who shall have attained the full age of eighteen years and every female who shall have attained the full age of fifteen years shall be capable in law of contracting marriage, if otherwise competent."

Reading these two statutes together, we can appreciate why it should be held that the latter, since it related to minors and not to persons of full age, as does ours, changed the common law age of consent to eighteen in males and fifteen in females. To like effect is *People v. Slack*, 15 Mich. 193, where it was held that the statute fixing the age of legal consent at eighteen years for males and sixteen for females abrogated the common law rule. The Texas statute pro-

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vides that males under sixteen and females under fourteen shall not marry, and the cases from that state accordingly hold that the common law rule no longer exists. New York has passed several statutes on this subject. One passed in 1827 prescribes fourteen years for females and seventeen for males as the age of legal consent. This was repealed in 1830 and was not reenacted until 1887, when the age of legal consent was fixed at eighteen years in males and sixteen in females. In the time intervening between the repeal and reenactment of this statute, there was no statute in that state prescribing the age of legal consent, and the common law rule of fourteen years for males and twelve for females prevailed. *Bennett v. Smith*, 21 Barb. 439; *Moot v. Moot*, 37 Hun 288; *Conte v. Conte*, 81 N. Y. Supp. 923.

The Alabama statute provides that, "A man under the age of seventeen and a woman under the age of fourteen are incapable of contracting marriage," and this was held to enlarge the age of consent from that fixed by the common law. *Beggs v. State*, 55 Ala. 108. Here the same reasoning would obtain as in the Wisconsin, Michigan, and Texas statutes.

Many other similar statutes might be cited under which it could be held that the common law age of consent has been raised to the ages fixed in such statute. But we cannot escape the conclusion that, since our statute makes no attempt to fix the age at which infants of either sex may marry within this state, reference must still be had to the common law to determine what that age is, and to find the age when, under § 7162, "either party to a marriage shall be incapable of consenting thereto, for want of legal age;" and that, since no statute declares the marriage of such a person to be void or voidable, the marriage of males of fourteen and females of over twelve is a valid contract that can be annulled only upon the same grounds as would annul the marriage of males over twenty-one and females over eighteen. *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Parton v. Hervey*, 1 Gray 119; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555.

Section 7164, providing that a license to marry shall not issue to males under twenty-one nor females under eighteen and over fifteen unless the written consent of the parents or legal guardian be first obtained, is only a regulation concerning the issuance of a license to marry in no wise affecting the marriage status. *In re Hollopeter*, 52 Wash. 41, 100 Pac. 159, 132 Am. St. 952, 21 L. R. A. (N. S.) 847. In that case the female was fourteen years of age at the time of the marriage, and the parents sought to invalidate the marriage because of fraud in obtaining the license, and that the female was incapable of consenting because of lack of age. The following extract from that case is important upon the question now before us:

"Imogene was within the common law age of consent, so that we cannot hold, as a matter of law, as did the lower court, that she was incapable of consenting to the marriage. But it is argued that the common law age of consent is overcome in this state by the enactment of the law fixing the age of eighteen as the age under which a female cannot consent to carnal sexual intercourse. The fact that the law permits the marriage of minors at all is enough to overcome the argument advanced in behalf of this proposition. To so hold would be to say, in effect, that the enactment of the statute covering and defining the crime of statutory rape was a repeal of the law permitting infants to marry, even though they had the consent of their parents. Such was manifestly not the intention of the statute, for it is sometimes important that those under the statutory age should marry, and under certain conditions such marriages are to be encouraged. Applied to a particular case, the rule that infants of the age of fifteen and twenty, as the parties now are in this case, may marry, may seem harsh. But it must be remembered that it is the same rule that would sustain the marriage of a man all but twenty-one and a woman who is not quite eighteen. Experience has taught us that the rule that marriage solemnized and consummated without the consent of a parent is valid, is not only salutary but wholesome and necessary, although there are now, and always will be, those who oppose the thought of marriage under legal age."

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The case of *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724, is cited by respondent as favoring his contention, but that case is not in point upon the question here presented. The only error there assigned was the refusal of the lower court to award suit money and attorney's fees, the appeal being taken from an order sustaining a demurrer to the complaint upon the ground that it did not state facts sufficient to authorize such awards. The court did not review the judgment of annulment, since no appeal was taken from the judgment and no one was complaining of the finding of the lower court upon the dissolution of the marriage.

It might be added that the fact that license is issued for the marriage of infants, upon the written consent of their parents, is a recognition of the fact that infants are capable of giving their own consent thereto; for assuredly the law would not give its sanction to a marriage between parties whom it did not regard as capable of giving their consent thereto, and the requirement of parental consent is not to be regarded as meaning that infants are incapable of assenting to their own marriage. Infants may consent to contract marriage even though such consent, like their other executory contracts, may not be enforced against them. Parental consent adds nothing to the age or consenting capacity of the infant. Requirement of such consent simply means that infants may not be licensed to marry upon their own consent alone, but that the consent of their parents must be added thereto; lack of such consent, however, not affecting the validity of a marriage, but only subjecting those who have neglected to acquire it to the penalties of the law.

We believe we have not erred in finding a distinction between our statute and those of states supporting the authorities relied upon by respondent. Grave public and collateral private interests are involved in matrimony. As is said in 1 Bishop on Marriage and Divorce, § 586:

"No special public harm is done when a minor promises marriage, then breaks his promise and pleads his nonage.

But it would be a public scandal, an enormous abscess on the body politic, and a private curse to permit minors to come together in actual matrimony, then leave each other because of their nonage, then pair off differently, and continue the process until they were twenty-one years old."

Notwithstanding the direful results of such a law, it would be our duty to uphold it when we found it plainly written. We do not so find it, and the judgment is reversed.

CROW, C. J., FULLERTON, and PARKER, JJ., concur.

MOUNT, J. (dissenting).—It seems clear to me that Rem. & Bal. Code, § 7150 (P. C. 329 § 1), fixes the ages at which persons are capable of contracting marriage. This section necessarily implies that persons under the ages therein mentioned are incapable of entering into a marriage contract. Section 7162 (P. C. 329 § 3) emphasizes this construction, for it says:

"When either party to a marriage shall be incapable of consenting thereto, for want of legal age . . . such marriage is voidable, but only at the suit of the party laboring under the disability . . ."

These sections clearly modify the common law rule and make it plain that a marriage entered into by persons under these ages may be avoided. The trial court, therefore, was right in entering the judgment which was entered, and in my opinion the same should be affirmed. I therefore dissent.

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Opinion Per PARKER, J.

[No. 11850. Department Two. July 27, 1914.]

DUNCAN FISKE, *Respondent*, v. EDWIN E. ELSTON,
Appellant.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to require an election between inconsistent theories in the complaint is not prejudicial, where the plaintiffs did in fact proceed upon one theory only, and the case was tried and evidence introduced upon that theory, which was well understood by both parties throughout the trial, and no surprise was claimed.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 20, 1913, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

E. L. Skeel and *W. M. Whitney*, for appellant.

Tucker & Hyland, for respondent.

PARKER, J.—This is an action to enforce an oral contract for the repurchase of certain shares of the capital stock of the Coast Carton Company, a corporation, which contract the plaintiff claims was made and entered into between him and the defendant at the time of the purchase of the stock by him from the defendant; the plaintiff having tendered return of the shares to the defendant and demanded the amount of the repurchase price agreed upon. Trial before the court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

The principal question here presented is one of fact; that is, as to whether or not the contract sued upon was, in fact, entered into. A careful review of the evidence brought here touching this question convinces us that it preponderates in favor of the plaintiff, and that the learned trial court's finding in his favor upon that question is well supported by the

¹Reported in 141 Pac. 1138.

evidence. The testimony of the plaintiff and defendant themselves is in serious conflict, but one other person testified as to the making of the contract here sued upon, whose testimony was, in substance, the same as the plaintiff's version of the transaction.

It is contended by counsel for appellant that the trial court erred in denying their motion calling for an election by counsel for respondent at the beginning of the trial as to the theory upon which they would proceed with the trial; that is, whether respondent's counsel would proceed upon the theory of fraud and rescission of the original contract of purchase of the stock, or upon the theory of contract for the repurchase of the stock. This motion was based upon the language of the complaint, which does furnish some ground for argument as to its presenting these two somewhat inconsistent theories. However, while the court did not, at the beginning of the trial, require counsel for respondent to announce the theory upon which they would proceed, they did, nevertheless, proceed upon the theory of contract, and the cause was tried and evidence introduced upon that theory. It seems plain to us that no prejudice resulted to the appellant from the court's ruling upon the question of election. Plainly, the cause was tried upon a theory well understood by counsel for both parties during the whole course of the trial. No surprise was claimed, and, manifestly, no prejudice resulted to the appellant from the course pursued. The record before us, we think, renders it quite clear that no error was committed to appellant's prejudice; that he had a fair trial, and that the cause was correctly disposed of.

The judgment is affirmed.

CROW, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

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Opinion Per Curiam.

[No. 11869. Department One. July 27, 1914.]

J. F. CAMPION *et al.*, Respondents, v. W. H. KEHOE *et al.*,
Appellants.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS. In the absence of exceptions to the findings, the evidence cannot be reviewed, and the judgment must be affirmed if the findings support the judgment.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered June 10, 1913, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Affirmed.

Voorhees & Canfield, for appellants.

Carl W. Swanson, for respondents.

PER CURIAM.—The respondents have interposed a motion to strike the statement of facts and the abstract of record, upon the ground that no exceptions were taken or reserved by the appellants to the findings of fact and conclusions of law made by the trial court, and a further motion that the judgment be affirmed upon the ground that the findings of fact and conclusions of law support the judgment.

An examination of the record discloses the fact that the grounds of both motions are well taken. So far as the record shows, no exceptions whatever were taken to the court's findings of fact. An examination of the findings convinces us that they amply support the judgment. In fact, no contention to the contrary has been advanced. In such cases, we have uniformly held that we cannot review the evidence. See *Washington Trust Co. v. Local & Long Distance Tel. Co.*, 73 Wash. 627, 132 Pac. 398, where some of the cases so holding are collected.

The motions are granted. The judgment is affirmed.

¹Reported in 141 Pac. 1138.

[No. 11891. Department Two. July 27, 1914.]

MARK MUNSON, *Respondent*, v. A. O. JOHNSON *et al.*,
Appellants.¹

NEW TRIAL—MISCONDUCT OF COUNSEL—OFFERS OF PROOF. Persistent offers of proof of evidence that had been previously excluded is not such misconduct of counsel as to require a new trial, where it cannot be said that counsel acted in bad faith with intent to place inadmissible evidence before the jury, and any prejudicial effect was removed by the court's instructions during the course of the trial requiring the jury to disregard all such excluded evidence.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON FACTS—REVIEW—HARMLESS ERROR. An introductory statement in the instructions to the jury that the action was "to recover damages suffered by the plaintiff by reason of breach of covenant," is not prejudicially erroneous as a comment on the facts.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 17, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Saunders & Nelson and *Robert F. Booth*, for appellants.

Roney & Loveless, *Jas. A. Dougan*, *John P. Hartman*, and *Arthur E. Nafe*, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages which he claims resulted to him from the breach, on the part of the defendants, of a covenant to repair the elevator in the Knickerbocker Hotel, in Seattle, which was leased to him by them. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

The principal contentions of counsel for appellants have to do with alleged misconduct of counsel for respondent in continuing to ask witness questions and making offers of proof touching items of loss, claimed by respondent, resulting from appellants' breach of the covenant to repair,

¹Reported in 142 Pac. 18.

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Opinion Per PARKER, J.

as to which the trial court had previously excluded evidence upon the objection of counsel for appellants. The record before us does evidence a considerable degree of persistence on the part of counsel for respondent in the direction complained of by counsel for appellants; but we cannot say that it was such as to warrant our holding that counsel acted in bad faith with an intention to ignore the court's prior rulings and place before the jury inadmissible evidence. The trial court seems to have taken special pains to avoid any possible prejudicial effect of counsel's questions and offers of proof upon the minds of the jury, instructing the jury to ignore all such excluded evidence. These instructions were given at different times during the progress of the trial, and also in the court's instructions at the conclusion of the trial. For instance, on one occasion, in connection with the court's ruling, the jury was told by the court:

"You are not to pay any attention or allow to have any weight with you any statement of counsel in offering evidence that the court excludes. You will try this case upon the evidence admitted in open court and not upon the offers or arguments."

Similar observations were made by the court to the jury on other occasions, when ruling against counsel for respondent. The controversy has been apparently accompanied by considerable feeling between the parties. This also seems to have been reflected to some extent by counsel for the respective parties during the trial of the case. If counsel for respondent are subject to any criticism of the nature sought to be made by counsel for appellants, we think it may be said, from the record as a whole, that counsel for appellants are also, in a measure, subject to the same criticism. We think, however, that whatever prejudice might have occurred of the nature complained of, it was capable of being, and was, in fact, cured by the court's admonitions and instructions to the jury made from time to time during the trial.

In the beginning of the court's instructions given to the

jury, the cause was referred to by the court as an action by the plaintiff, "seeking to recover damages suffered by him by reason of a breach of covenant," etc. This is complained of by counsel for appellants as a comment upon the facts, it being argued that it amounts to a statement on the part of the court that damage claimed was, in fact, suffered by the plaintiff. This was a mere introductory remark by the court for the purpose of stating the nature of the action. Reading the instructions as a whole, we think it is quite plain that the court submitted to the jury the questions of the breach of the covenant by appellants, whether damages resulted therefrom to respondent, and the amount thereof, if any. Reading the instructions as a whole, we are quite unable to see how any one would infer therefrom that the court had any opinion as to whether or not damage had been suffered by respondent or as to the amount thereof.

Other rulings of the trial court are complained of as erroneous. These claims of error, we think, are without merit and do not call for discussion. The verdict finds ample support in the evidence as to the breach of the covenant, damage flowing therefrom, and the amount thereof found by the jury. Indeed, counsel for appellant do not seem to be seeking a new trial upon the ground of the insufficiency of evidence. We think the cause does not call for further discussion.

The judgment is affirmed.

CROW, C. J., FULLERTON, MOUNT, and MORRIS, JJ., concur.

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Syllabus.

[No. 11898. Department Two. July 27, 1914.]

WILLIAM L. BANE *et al.*, Respondents, v. FRANK P. DOW
et al., Appellants.¹

CORPORATIONS—CONTRACTS—TERMINATION—CORPORATION AS SUCCESSOR TO PARTY. There is no termination of a contract between custom house brokers respecting the handling of an importing business and the division of fees thereunder, by the subsequent incorporation of one of the parties theretofore handling the business as an individual, where, up to the time of trial, there was no serious contention that the original contract was not still in force, the parties recognized the corporation as succeeding to the interests of the individual, and the corporation continued to transact the business as previously done.

JOINT ADVENTURES—CONTRACTS—DIVISION OF PROFITS—DEDUCTION OF EXPENSES. Under a contract between custom house brokers for the handling of an importing business and a division of fees thereunder, in which the fees for entry and the profits derived from cartage were to be divided on an equal basis, a finding that the division of profits for cartage should be made after deducting the actual cost of teaming is proper, and not that a proportional expense of the business should be deducted therefrom before such division, it appearing that the custom among brokers was to deduct only the cost of the haul in determining profits derived from cartage, and that the parties placed this construction upon the contract; since it was an engagement in a common enterprise upon a profit-sharing basis, and not governed by rules relating to partnership.

SAME—TERMINATION OF CONTRACT—CONSTRUCTION BY PARTIES. Such contract is not terminated where there is nothing to show an intention of the parties as to when it should terminate, and, while construing the contract differently, each of the parties has always recognized it as still in force.

JOINT ADVENTURES—CONTRACTS—DIVISION OF PROFITS. Under a contract between custom house brokers for the handling of an importing business and a division of profits thereunder, which division was to be "on entry and any profits that may accrue through attending to cartage," the item of forwarding charges is not included therein, where there is nothing in the contract contemplating a division of such charge, and a letter passing between the parties stated that "you are to make no charge for forwarding," even though the importer allowed such charge to be made.

¹Reported in 142 Pac. 23.

COSTS—ON APPEAL. Where both parties appeal, and neither is successful in attacking the judgment, costs will not be allowed in the supreme court.

Cross-appeals from a judgment of the superior court for King county, Gilliam, J., entered September 12, 1913, upon findings favorable in part to the plaintiffs, in an action on contract, tried to the court. Affirmed.

Kerr & McCord, for appellants.

Fred W. Catlett and Emmons & Emmons, for respondents.

MORRIS, J.—The parties to this action are custom house brokers, respondents doing business at New York City, and appellants at Seattle. In February, 1903, respondents, claiming to control certain importing business of New York merchants passing through the port of Seattle, wrote to Frank P. Dow, who was then doing business as an individual, suggesting they would obtain this business for Dow upon consideration of an equal division of fees. Dow accepted this offer, and respondents then informed him that the business to be turned over was that of Morimura Brothers. As fixing the terms of the contract between them, this letter stated: "We expect you to divide with us on entry and any profits that may accrue through attending to the cartage." A few days thereafter, Dow received a letter from Morimura Brothers, suggesting the fees to be paid as three dollars per invoice for entry, fifteen cents per case for cartage, and six cents per case for forwarding. Dow accepted these terms, and under them, undertook the business, remitting to respondents from time to time one-half of the entry charge and one-half of the profits accruing from the cartage, but making no reference to the forwarding fee of six cents per case.

On January 1, 1906, Dow incorporated his business as the Frank P. Dow Company, and the corporation from that time continued the same relation with respondents and Morimura Brothers without change until April, 1908, when

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Morimura Brothers, making some objections to the amount being charged for cartage, a new arrangement was entered into, and the fee was fixed at twenty-five cents per case for each case actually carted, the other fees remaining the same. Through this correspondence, respondents learned for the first time that Morimura Brothers were paying a forwarding fee of six cents per case, and demanded an accounting of this fee, and one-half of the profits on the new cartage fee after deducting the actual cost appellants were put to in transporting the cases from the appraiser's store. Appellants refusing to recognize any claim of respondents to share in the forwarding fee, this action was brought.

The lower court held that respondents were entitled to an equal share in the profits on the cartage, and fixed the profits at 13.7 cents per case; but denied them any share in the forwarding fee of six cents per case, upon the ground that the contract between appellants and respondents did not contemplate a division of the forwarding fee. The court then called for additional evidence to enable it to enter a decree under the rule it had announced. This evidence was furnished, and a decree was then entered awarding respondents \$730.77, with interest from date as against Frank P. Dow individually, and \$3,575.74 as against the corporation. From this decree, all parties appeal.

While making numerous assignments, appellants' contentions may be classified as, error on the part of the lower court in holding that the contract did not terminate with the formation of the corporation in January, 1906; that an erroneous basis was adopted in computing the profits on the cartage; and that error was committed in arriving at the amount awarded respondents. Up to the trial of this action, we fail to discover any serious contention that the original contract, so far as it affected a division between the parties, was not still in force. Both parties recognized that the corporation succeeded to the interests of Frank P. Dow under the original contract, and under this assumption, the corpo-

ration continued to transact the business and account to respondents as Frank P. Dow had previously done. Under these circumstances, we find no merit in the contention that, for all purposes, the corporation was not the successor in interest of Frank P. Dow and should not now be held to the terms of the original contract.

The main contention under the second assignment is that the lower court used a wrong basis in finding that the cost of cartage was 1.3 cents per case, and that a division of the profits on this item should be made on the basis of 13.7 cents per case, appellants contending that the correct rule would permit appellants to deduct from the cost of the cartage the proportion of the entire expense of conducting the business of Frank P. Dow Company that the business of Morimura Brothers bears to the entire business of Frank P. Dow Company. It was established by the evidence that 1.3 cents per case for cartage represents the actual cost of the teaming. It is further established that, in contracts of a like nature, a general custom exists among custom house brokers to deduct only the cost of the haul in determining what are the profits derived from cartage. We think it is apparent from the record that such was the construction placed upon this contract by the parties. So far as the language of the contract is concerned, there is no distinction between the entry fee and the profits derived from cartage. They are both to be divided on an equal basis. Appellants make no contention that the proportionate expense of the whole business is to be charged to the entry fee before any division is made, and we assume the necessary labor in attending to the entry bore its proportionate share of the entire expense of the brokerage business as the necessary labor in attending to the cartage. We also find that appellants, in referring to this item in letters, speak of it as "profit on teaming;" and in accounting to the respondents, we can find nothing to indicate that appellants ever took any other view of this stipulation than that it entitled respondents to share in the cartage charge,

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after deducting the actual cost of the haul or the sums paid for carting the cases from the appraiser's store to the railway preparatory to forwarding the merchandise from Seattle to New York. The parties to this contract united for the purpose of making money from a brokerage of the importing business of Morimura Brothers. Each contributed something to that enterprise. Respondents contributed the business; appellants contributed services. The performance of the services certainly included every item incidental to that performance. If appellants be now permitted to charge against the business of Morimura Brothers a proportionate share of doing their entire brokerage business, then manifestly they contributed nothing to the common enterprise, and respondents must not only furnish the business but share with appellants in the expense of doing it. If appellants can charge the expenses of doing the business, then respondents, by the same rule, would be entitled to charge any expense they might have incurred in procuring the business of Morimura Brothers. This, we think, shows the fallacy of appellants' contention. It is not like a partnership where the entire cost of the business is to be reckoned before determining the profits; but rather an engagement in a common enterprise upon a profit-sharing basis in which each party furnishes a part of that which is necessary to the success of the venture. In such cases, we believe the rule is as stated in 23 Cyc. 459:

"No part of the expenses incurred by one party in the execution of his part of the common enterprise can be charged against the other parties; but should be deducted from his share of the profits."

We think the rule should be the same here as if two real estate brokers entered into an arrangement whereby one, having a certain piece of real estate for sale, offered another a division of the commission if he should procure a buyer. In such a case, we do not think it would be contended that the agent procuring the buyer would be entitled to charge

against the commission a proportionate share of his general office expenses for the time consumed in making the sale. Nor if two lawyers united in a division of legal fees upon the basis of one furnishing the business and the other performing the necessary services, that the one rendering the service would be allowed to charge against the fee a proportionate share of his general office expenses.

Exception is also taken to the lower court's conclusion of law that the contract is still in force. We can find no reason for finding that it has terminated. The contract itself furnishes no rule for ascertaining the intention of the parties as to when it should terminate. And while the parties have had differences in its construction, each has always recognized the contract as still in force. Neither party can withdraw from such a contract because it is no longer advantageous to him. So far as the facts of this record appear, we hold that the contract is still in force.

Respondents' chief complaint, under their cross-appeal, is that the lower court refused to permit them to share in the six cents forwarding charge. We think this ruling was correct. Whatever may have been the basis of the fees to be charged as between appellants and Morimura Brothers, respondents' right to any share of those fees is to be determined by the contract they made, and that contract does not contemplate any division of this charge. Respondents base their strongest argument in support of their contention upon the claim that a fair reading of the contract, when applying all principles governing the interpretation of contracts, shows that the parties contemplated a division of all elements of profit. The contemplation of the parties to a contract is to be determined from the language of the contract when that language is plain and unambiguous. When these parties stipulated that the division was to be "on entry and any profits that may accrue through attending to cartage," the court has no right to add another element of profit and

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say that the division should also include forwarding charges. That this charge was not within the contemplation of the parties is clear from respondents' letter of March 19, 1908, in which this appears: "You are to make no charge for forwarding." If thereafter Morimura Brothers permitted appellants to make such a charge, respondents cannot make such permission the basis of their recovery, since their rights are to be determined by their own contract, and not by that of Morimura Brothers.

Each party attacks the various amounts reached by the court. We have gone over these as carefully as we can in the endeavor to reach the right solution of the problem. The result is we find no error in the finding of the lower court.

The judgment is affirmed; and since all appeal and neither party succeeds in its attack upon the judgment, neither party will recover costs in this court.

CROW, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 11938. Department Two. July 27, 1914.]

JOHN F. ANDERSON, *Respondent*, v. C. H. KINNEAR,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained through a collision with an automobile, driven at an excessive rate of speed and in plain violation of law, the refusal of the court to grant a nonsuit on the ground of the contributory negligence of the plaintiff was warranted, where it appeared that the plaintiff, as soon as he saw the defendant's automobile, shut off the power of his motorcycle and entered upon the crossing at a slow rate of speed, and finally stopped his motorcycle, but was nevertheless run down and injured.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse an instruction defining contributory negligence, where the same was, in substance, given by the court in other instructions.

TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. An instruction that an ordinance of a city limited the speed of automobiles on city streets, except at street crossings, where the laws of the state fixed the maximum rate of speed, and that if the defendant was found to have violated the law in this respect the verdict should be for plaintiff, is not objectionable as a comment on the evidence in that the ordinance limiting the rate of speed made no exception at street crossings, since the ordinance must be construed in connection with the state law.

SAME—ASSUMPTION AS TO FACTS. An instruction is not faulty in that it assumes that an automobile was traveling along a certain street in the city of T., where there was no pleading or proof that the collision occurred in such city, when it was assumed at the trial that the street was in the city of T., the case was tried there, and the jury was sent to view the place of the accident.

MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE PER SE. It is negligence *per se* to drive an automobile on a city street at a speed in excess of the rate fixed by a city ordinance and the state law.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 19, 1913, upon the

¹Reported in 141 Pac. 1151.

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verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a collision with an automobile. Affirmed.

Claassen & Williams, for appellant.

Govnor Teats, Leo Teats, and Ralph Teats, for respondent.

MOUNT, J.—Plaintiff brought this action to recover for personal injuries alleged to have been sustained as the result of being run over by an automobile driven by the defendant. The case was tried to the court and a jury, and resulted in a verdict in the sum of \$1,000 in favor of the plaintiff. (After motions for a judgment notwithstanding the verdict and for a new trial were overruled, a judgment was entered upon the verdict for the amount thereof.) The defendant has appealed.

He first argues that the court erred in denying his motion for a nonsuit upon the ground that the evidence showed that the plaintiff was guilty of contributory negligence. The facts, as disclosed by the plaintiff's evidence, and evidently as found by the jury, were that, on March 23, 1913, soon after noon, while the plaintiff was traveling west up the grade on 17th street, in the city of Tacoma, riding a motorcycle, just before he came to the intersection of 17th with "E" street, he saw the defendant traveling south on "E" street in his automobile. Plaintiff testified that the defendant was traveling at the rate of about twenty-four miles an hour; that the plaintiff, as soon as he saw the defendant's automobile, shut off the power of his motorcycle and entered upon the crossing of "E" street at the rate of two or three miles an hour; that, after going to about the center of the crossing, and seeing that the automobile was coming upon him, he stopped his motorcycle, but nevertheless was run down by the automobile, and injured. There was other evidence to the same effect.

It is plain that, if the appellant was traveling south on "E" street at the rate of more than twelve miles an hour, he was negligent, because the city ordinance introduced in evidence provides, in substance, that no person shall drive or operate an automobile on this street at a greater rate of speed than twelve miles an hour. The statute, Rem. & Bal. Code, § 2531 (P. C. 135 § 557), prohibits automobiles from driving over cross-walks or crossings or street intersections within the limits of any city or town, when any person is upon the same, at a rate of speed faster than one mile in fifteen minutes. The respondent in this action was upon the crossing when he was injured. According to the testimony, he had stopped at the time the automobile struck him. It was clearly negligence for the appellant to run upon this crossing at the rate of twelve miles per hour when the respondent was upon the crossing, and if the appellant ran upon the respondent at this rate of speed while the respondent was standing still, the appellant was clearly guilty of negligence and the respondent was entitled to recover. We are satisfied, therefore, that the court properly submitted this question to the jury, and did not err in denying the appellant's motion for a nonsuit. *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903.

It is next argued that the court erred in refusing to give an instruction as follows:

"Contributory negligence is any negligence upon the part of the plaintiff that proximately or naturally contributed to the injury and if you find from the evidence that the plaintiff was guilty of any such negligence as above defined, your verdict must be for the defendant."

There was no error in refusing this instruction, because the court in substance gave the instruction, for the court said:

"If you find from the evidence that has been introduced that both the plaintiff and the defendant were guilty of neg-

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ligence, that is, did not use the degree of care which an ordinarily prudent person would use under the circumstances and conditions in which they were situated, then and in that event, your verdict should be for the defendant.

"A good guide to determine whether the plaintiff was guilty of negligence contributing to the injury is; would there have been no accident and no injury to the plaintiff but for the negligence of the plaintiff. And, finally, did plaintiff under all the circumstances of the case, exercise that degree of care which an ordinarily prudent man would have used under the same circumstances. If you find that the plaintiff did not use such degree of care, then he cannot recover in this action."

These instructions clearly define contributory negligence.

The appellant next argues that the court erred in giving an instruction as follows:

"You are instructed that the ordinance of the city of Tacoma limits the speed of automobiles and motor vehicles along "E" street, as far south as the south side of south 17th street, at a rate of speed not to exceed 12 miles per hour, except at street crossings, and the laws of the state of Washington set the maximum rate of speed at which a vehicle may proceed over street crossings, such as the crossing at 17th and "E" streets, at four miles per hour when a person is on the crossing; so if you find in this case that the defendant was propelling his automobile southward along "E" street at a rate in excess of 12 miles an hour, and in excess of four miles per hour on the intersection of the two streets, when there was another person on the crossing, then you will find the defendant guilty of negligence, and if you find that the defendant was exceeding the speed limit, as I have defined above, and that that was the proximate cause of the collision; and if you further find that the plaintiff was not himself guilty of contributory negligence, then your verdict shall be for the plaintiff."

It is first argued that this instruction is erroneous because it is a comment upon the evidence, because the ordinance of the city of Tacoma which was introduced in evidence limits the rate of speed to twelve miles per hour on this street

and does not make an exception at street crossings; but the statute hereinbefore referred to makes the exception at street crossings. It is plain that this instruction is not a comment upon the fact; and it is also plain that the ordinance must be construed in connection with the state law on the subject.

It is next argued that the instruction assumes a fact that is neither pleaded nor proved, because it assumes that the automobile was traveling along "E" street *in the city of Tacoma*. It is true there was no specific allegation in the complaint that the collision occurred in the city of Tacoma, and it is true there was no specific statement in the evidence that it occurred in the city of Tacoma. But it was assumed at the trial that 17th and "E" streets were in the city of Tacoma. The case was tried in the city of Tacoma; the jury was sent to the place where the accident occurred. The court no doubt had the right to take notice of the fact that the accident occurred in the city of Tacoma. There was no error, therefore, in assuming or instructing the jury that the accident occurred in the city of Tacoma.

It is next argued that the instruction is erroneous for the reason that it, in substance, instructed the jury that, if the the appellant was propelling his automobile along "E" street at a rate in excess of twelve miles per hour or four miles per hour on the intersection of two streets, that then they should find him guilty of negligence, and was in substance an instruction that a violation of the city ordinance and the state law was negligence *per se*. We have so held in *Hillebrant v. Manz* and *Ludwigs v. Dumas*, *supra*.

It is next argued that the court erred in denying the appellant's motion for judgment notwithstanding the verdict. At the trial the appellant attempted to show that, instead of the appellant running down the respondent, the respondent with his motorcycle ran against the automobile of the appellant. This was purely a question for the jury, and the court did not err in denying the motion.

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It is lastly argued that the judgment is excessive. We are not satisfied that it is excessive.

We find no error in the record, and the judgment is therefore affirmed.

CROW, C. J., FULLERTON, MORRIS, and PARKER, JJ., concur.

[No. 11944. Department Two. July 27, 1914.]

D. A. DUFFY, *Appellant*, v. J. FRED BLAKE, *Respondent*.¹

FRAUD—MISREPRESENTATIONS—ACTION FOR DAMAGES—EVIDENCE—QUESTION FOR JURY. Whether the defendant was guilty of fraud in inducing a sale of a one-half interest in a second-hand furniture business is a question for the jury, where the defendant represented the stock as worth \$11,413, that the business had made a profit of \$4,600 the preceding year, and that a note given by plaintiff as balance of the purchase price could be paid from the profits, when in fact the stock was worth less than \$5,000, the profits were less than \$2,000, and no profits resulted after the giving of the note, the plaintiff testifying that he was ignorant concerning goods of the character purchased, the cost thereof or the selling price, but that he relied upon an inventory made by the defendant and upon representations made by him and the broker who handled the sale, the latter being an intimate acquaintance of some years, and it appeared that had plaintiff examined the books he would have been unable to determine what the stock was worth or what the profits had been.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 6, 1914, dismissing an action in tort, upon granting a nonsuit, after a trial before a jury. Reversed.

Carkeek, McDonald & Kapp, for appellant.

Eugene A. Childe, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover damages from the defendant on account of false representations.

¹Reported in 141 Pac. 1149.

The false representations alleged in the complaint are to the effect, that the defendant represented to the plaintiff that the Valdez Furniture Company had a stock of merchandise worth \$11,418, when it was worth less than \$5,000; that the business had made a net profit of \$4,600 for the preceding year, when it had made less than \$2,000; that a note for \$2,000 was given by the plaintiff to the defendant with the agreement that it would be paid out of the profits of the business, when in fact there were no profits from the business after the note was given.

The cause was tried to the court with a jury. At the close of the evidence on behalf of the plaintiff, the trial court granted a nonsuit and dismissed the action. This appeal followed.

It appears from the evidence offered on behalf of the plaintiff that, prior to the first day of July, 1910, the defendant, J. Fred Blake, was operating a second-hand furniture store in the city of Seattle. This business was incorporated and known as the Valdez Furniture Company. The defendant Blake owned substantially all the stock. He desired to sell an interest in the business, and offered for sale one-half of his stock. A Mr. Rutherford acted as broker. The plaintiff at that time was a man 75 years of age. He had known Mr. Rutherford for ten or twelve years. Mr. Rutherford introduced the plaintiff to the defendant, and the plaintiff was informed that the defendant desired to sell one-half of his shares of stock in the Valdez Furniture Company. The plaintiff, for about twenty years preceding July 1st, had been engaged in the bakery business. He had sold his business and desired to enter other business. Previous to engaging in the bakery business, for a number of years he had been engaged in the general merchandise business, consisting of gents' furnishing goods, boots, shoes, etc. At the request of the defendant, the plaintiff visited the furniture store, and was informed by the defendant that the stock of merchandise on hand was of the value of ten or twelve thousand dollars.

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The plaintiff inquired as to the profits of the business and the defendant stated that, for the year 1909, the business had made a profit of \$4,600. The defendant stated he would sell one-half the stock of the company for \$5,000. The plaintiff stated that he would not purchase the stock of the corporation unless an inventory was made of the second-hand goods on hand. An inventory was taken by the defendant and two men in his employ. The plaintiff was there part of the time while the inventory was being taken. He had no experience in the furniture business, did not know the value of second-hand furniture, and so stated to the defendant. While the inventory was being taken, the defendant requested his employees to put the prices up, which was done. As a result, the inventory showed that the stock of goods was worth \$11,413.30. The plaintiff thereupon stated that he did not have \$5,000, the amount asked by the defendant for one-half the stock of the corporation; that he had only \$3,000. Whereupon Mr. Blake told him that the profits of the business would pay the balance of the purchase price, \$2,000, within one year, and that Mr. Duffy might give his note for the balance. Accordingly, \$3,000 was paid in cash on the 5th day of July, 1910, and a note executed for the sum of \$2,000, payable in one year. The plaintiff then went into the store, and soon after learned that articles were being sold for much less than the prices named in the inventory. He complained to Mr. Blake, and was informed that the inventory was about double the value of the goods.

Soon after the note for \$2,000 was executed, it was sold by Blake to innocent purchasers. Suit was afterwards brought upon it, and a judgment was had against the plaintiff for the amount of the note, with interest and costs. See *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907.

The plaintiff testified that he knew nothing about the value of these second-hand goods, and relied upon the statements of Mr. Blake with reference to their value; and also relied upon his statement with reference to the profits the business had

been making. The plaintiff also testified that he saw some books in the office, but did not examine them to find out the condition of the business or the profits which had been made. The evidence shows that the stock of goods on hand at that time was not worth to exceed \$6,000; that the profits for the year 1909 were \$1,016 instead of \$4,600; and that, after the plaintiff purchased the stock and went into the store, there were no profits.

The trial court was of the opinion that, because the plaintiff was an experienced business man, was present at the time the inventory was taken, and knew that the books were at hand which disclosed the condition of the business, he was therefore bound to take notice of the value of the stock of goods, of the condition of the business, and the profits which were shown by the books. We are satisfied that the evidence in this case was sufficient to take the case to the jury. The appellant testified that he was entirely unacquainted with goods of this character; that he knew nothing of the cost of such goods, or the selling price. He had known Mr. Rutherford intimately for a period of ten years. It is true, he had but recently been introduced to Mr. Blake, but he was introduced by Mr. Rutherford and was told that Mr. Blake was a member of the Presbyterian church in good standing; and he testified that, because of his friendship with Mr. Rutherford, who introduced Mr. Blake, and because Mr. Rutherford was secretary of the corporation, he thought he could rely, and did rely, upon the representations made by Mr. Blake, both as to the value of the goods and as to the profits the business had made during the last year. He testified that he did not examine the books, nor ask to examine them. It was not shown that he could have told after an examination of the books what the stock was worth, or what the profits had been. One of the books is in evidence before us, and we are unable to determine these facts from this book. It is probable that a bookkeeper might have been able to do so. In fact, the bookkeeper placed upon the stand did testify as

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to the value of the goods as shown by the books, and as to profits which had been made. But it was not shown that Mr. Duffy, even though he was an experienced man, knew anything about bookkeeping, or about books of account. We are satisfied that there was sufficient evidence in this case to take it out of the rule of *caveat emptor*, as was evidently applied by the trial court, and to require the case to be submitted to the jury upon the question of false and fraudulent representations. In *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, we said:

"Appellants contend their judgment is well founded upon the rule announced in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102, and other like cases, where it has been held that the tendency of modern cases is to restrict, rather than to extend, the doctrine of *caveat emptor*, and that the unmistakable drift is toward the doctrine that wrongdoers cannot shield themselves from liability by asking the law to condemn the credulity of their victims and give them an unbridled license to lie and deceive. No better illustrations of this modern tendency can be found than in the decisions of this court for the past few years; but it will be found that, in all of these late cases, there was a false assertion of an existing fact the truth of which was peculiarly within the knowledge of the vendor, or means of knowledge; or the property was at a distance and the opportunity of ascertaining the true facts not readily ascertainable; or the misrepresentation was made for the purpose of inducing the other party not to make an investigation and ascertain the true facts; or the vendor knew that the vendee did not intend to make a personal investigation but relied absolutely on the truth of the facts communicated to him. It was not intended, in any of these cases where the decision has been based upon some one of the above facts, to attempt to depart from the rule here first asserted, and the distinction between these two rules and the facts to which each is applicable is pointed out in *Wooddy v. Benton Water Co.*, *supra*, quoting from 14 Am. & Eng. Ency. Law (2d ed.), 120, 121, where the rule is thus stated:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth

of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself. By the weight of authority, and in reason the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the parties have equal present opportunity and means to ascertain the truth at the time of the transaction, and does not apply merely because it is possible to ascertain the facts. Indeed, it has been held that a person is justified in relying on a representation made to him, in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth.' "

And so it is in this case. The value of this stock of goods was peculiarly within the knowledge of Mr. Blake; the profits for the preceding year were peculiarly within his own knowledge; the cost of second-hand goods was peculiarly within his own knowledge. He knew that Mr. Duffy was unacquainted with the cost of second-hand goods; and he undoubtedly knew that Mr. Duffy would rely upon the inventory made by him and his clerks. Mr. Duffy did not know the cost of second-hand goods. This means of knowledge was not open to him. While it is true that the means of acquiring knowledge of the character of the goods was open to Mr. Duffy, and while the profits of the business, as shown by the books of account, were open to him, in order to acquire this knowledge it was necessary for him to make an investigation of the stock of goods and of the books. He did not attempt to do this; and we think he was not required to do it, but might rely upon the positive statements of Mr. Blake as to the value of the goods and as to the profits which had been theretofore made. We think this is especially so when the inventory was taken by Mr. Blake who knew that Mr. Duffy did not know the value of the goods, and knew that in all probability he would

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not inquire further as to the value of the goods, or as to the amount of profits that had been theretofore made. Upon the undisputed testimony of Mr. Duffy and his witnesses, we are satisfied that it was the duty of the court to submit the case to the jury, under the rule above stated.

The judgment is therefore reversed, and a new trial granted.

Crow, C. J., PARKER, FULLERTON, and MORRIS, JJ., concur.

[No. 12006. Department Two. July 27, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Charles H. Collins, Plaintiff*, v. I. M. HOWELL, *Secretary of State, Respondent*.¹

CORPORATIONS—NAME—FILING ARTICLES—DUTY OF SECRETARY OF STATE. Where the name of a proposed corporation is so similar to that of corporations lawfully doing business in the state as to lead to possible confusion, it is the duty of the secretary of state to reject the offered articles of corporation, under Rem. & Bal. Code, § 3680, providing that no corporation shall take the name of a corporation theretofore organized, nor one so nearly resembling the name of such other corporation as to be misleading; and the proposed name "Kennewick Fruit Exchange" is so similar to the name "Kennewick District Fruit Growers' Association" as to be misleading.

Application filed in the supreme court April 22, 1914, for a writ of mandamus to compel the secretary of state to file articles of incorporation. Denied.

M. M. Moulton, for relator.

The Attorney General and Edward W. Allen, Assistant (William Jennings Coyle, of counsel), for respondent.

MOUNT, J.—This proceeding is brought by the relator to obtain a writ of mandate to require the secretary of state to file articles of incorporation for the "Kennewick Fruit Ex-

¹Reported in 142 Pac. 1157.

change," and to issue a license authorizing it as a corporation to do business in the state of Washington.

The facts are not in dispute. It appears that the relator, with others, desiring to organize a corporation under the laws of the state of Washington, adopted articles designating the name of the corporation as "Kennewick Fruit Exchange," These articles of incorporation were presented to the secretary of state, together with the filing fee and the annual license fee. The secretary of state refused to file the articles or to issue the license, for the reason that the name "Kennewick Fruit Exchange," in his judgment, so nearly resembled the names of other corporations, already organized and doing business under the laws of the state, as to be misleading. It appears that, at the time the articles were offered to be filed, there were corporations lawfully doing business in the state under the following names: "Kennewick Fruit-Land Company;" "Kennewick District Fruit Growers' Association;" and "Kennewick Fruit & Produce Company."

The statute, Rem. & Bal. Code, § 3680 (P. C. 405 § 11), provides as follows:

"No corporation shall take the name of a corporation theretofore organized under the laws of this state, nor of any foreign corporation having complied with the laws of this state, nor one so nearly resembling the name of such other corporation as to be misleading. The secretary of state shall refuse to file said articles of incorporation of any association or corporation violating the provisions of this section."

It is argued by the *Attorney General* that, under this section, it was the duty of the secretary of state to exercise his judgment or discretion, and that this court will not review the judgment or discretion of an executive officer except for abuse thereof. A number of authorities are cited to that effect. But without deciding that question, we may assume, for the purposes of this case, that it is the duty of the secretary of state to exercise his judgment and discretion and his acts in this respect may be reviewed, both for mistake and for

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abuse. It does not necessarily follow that the officer has been mistaken or has abused his discretion in this case.

The relator argues that "Kennewick Fruit-Land Company," as shown by its articles on file in the office of the secretary of state, is not engaged in the fruit business, which is the business the "Kennewick Fruit Exchange" desires to engage in, but is strictly a land company. That "Kennewick Fruit & Produce Company," as shown by its articles of incorporation, is purely a retail grocery and implement company. While it is conceded that "Kennewick District Fruit Growers' Association" is engaged in the same line of business that the "Kennewick Fruit Exchange" seeks to enter. But it is clear that, under the statute, the name of the corporation alone must control the secretary of state. For the statute provides that no corporation shall take the name of a corporation theretofore organized, nor one so nearly resembling the name of another corporation as to be misleading. It is not the duty of the secretary of state, under this section, to inquire into the character of the business. It is his duty only to inquire into the similarity of the names and if, in his judgment, the names so nearly resemble each other as to be misleading, it is his duty to reject the offered articles of incorporation. We are also satisfied that the proposed name so nearly resembles the name "Kennewick District Fruit Growers' Association" as to be misleading.

In *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 69 N. J. Eq. 159, 60 Atl. 561, where these two companies were engaged in the same business, it was held that the names were so similar as to lead to uncertainty or confusion. In *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.*, 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841, it was held that the names were so similar as to be misleading. In *Merchants' Detective Ass'n v. Detective Mercantile Agency*, 25 Ill. App. 250, it was held that the names were so similar as to be misleading. In *In re United States Mercantile Reporting & Collecting Ass'n, Limited*, 4 N. Y. Supp. 916, the name "United States Com-

mercial Agency & Collecting Company" was held to be an infringement of the name "United States Mercantile Reporting & Collecting Ass'n, Limited."

Under the rule adopted in those cases, we are satisfied the secretary of state correctly decided that "Kennebec Fruit Exchange" so nearly resembled the name of "Kennebec District Fruit Growers' Association" as to be misleading and cause confusion.

The writ is therefore denied.

Crow, C. J., PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11338. Department Two. July 30, 1914.]

THE STATE OF WASHINGTON, *on the Relation of James W. Goss et al., Appellants, v. METALINE FALLS LIGHT & WATER COMPANY, Respondent.*¹

MANDAMUS—PROCEEDINGS—DEFAULT. Under Rem. & Bal. Code, § 1017, a writ of mandamus cannot be granted by default, but the case must be heard by the court whether the adverse party appears or not.

WATERS AND WATER COURSES—WATER COMPANIES—RATES—DISCRIMINATION—PUBLIC SERVICE COMMISSION—JURISDICTION. The public service commission is invested with exclusive jurisdiction, under the public utilities act (3 Rem. & Bal. Code, § 8626-1 *et seq.*), to pass upon and determine the question of a discrimination of rates charged by a water company.

WATERS AND WATER COURSES—WATER COMPANIES—RATES—DISCRIMINATION—COMPLAINT. A consumer, discriminated against by a water company in the matter of rates charged for water, has authority to file a complaint with the public service commission, under § 80 of the public utilities act, 3 Rem. & Bal. Code, § 8626-80, providing that "complaint may be made . . . by any person . . . in writing, setting forth any act or thing done or omitted to be done by any public service corporation," etc.; notwithstanding the proviso in § 80 that "no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any . . . water company,

¹Reported in 141 Pac. 1142.

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. . . , unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such . . . water" etc., the proviso pertaining only to complaints affecting the reasonableness of the schedule of rates or charges of a public service corporation, and not abridging the authority of an individual to complain of a discrimination in rates.

SAME. The party discriminated against, must, in any event, before resort to the courts, ask the public service commission itself to file the complaint, or apply to the city authorities to do so, or endeavor to induce other consumers to join in filing the complaint.

Appeal from a judgment of the superior court for Pend Oreille county, Jackson, J., entered April 11, 1913, dismissing an application for a writ of mandamus, on sustaining a demurrer to the petition. Affirmed.

Sherlock & Sheldon, for appellants.

Reading & Trumbull, for respondent.

CROW, C. J.—James W. Goss and Rosa Goss, his wife, as relators, petitioned the superior court for Pend Oreille county for a writ of mandamus requiring Metaline Falls Light & Water Company, a public service corporation, to furnish them with water at the rate of \$5 per month. The defendant interposed a demurrer, which was sustained, and relators have appealed from an order of dismissal.

Appellants, in substance, alleged that they are owners of improved real estate, in Metaline Falls, in which they are conducting a restaurant and a retail liquor business; that respondent, a public service corporation, holds a franchise granted by the town of Metaline Falls, and is engaged in supplying light and water to the citizens of that municipality; that respondent formerly supplied water to appellants' property at the rate of \$5 per month, which was and is the customary rate charged other consumers for a like supply; that, about February 1, 1913, respondent, without just or lawful cause, raised the rate on appellants' property to \$8.50 per month; that such increased rate was exorbitant, discrimina-

tory, and arbitrary; that appellants tendered the former rate and demanded a continuance of the service; that their tender was refused, and that respondent, on or about March 4, 1918, unlawfully and wrongfully cut off their water supply.

Upon this petition, an alternative writ and a show cause order, returnable on March 17, 1918, were issued and served. On March 24, 1918, appellants, by motion supported by an affidavit of nonappearance, asked an order of default and the issuance of a peremptory writ. This motion, which was made prior to appearance by respondent, was denied after respondent had appeared by its demurrer and answer. The demurrer was sustained on the ground that the trial court had no jurisdiction.

Appellants first contend that the trial court erred in overruling their motion for a default and for the issuance of a peremptory writ. There is no merit in this contention. Rem. & Bal. Code, § 1017 (P. C. 81 § 1761), provides that the writ cannot be granted by default, but that the case must be heard by the court whether the adverse party appear or not.

The controlling question before us is whether the trial court erred in sustaining the demurrer. Respondent insists that the state legislature has vested the public service commission with exclusive original jurisdiction to hear and determine all questions presented by the petition herein. Chapter 117, Laws of 1911, p. 538 (3 Rem. & Bal. Code, § 8626-1 *et seq.*), commonly known as the public utilities act. A careful examination of this act will disclose a legislative intention to invest the public service commission with exclusive original jurisdiction to hear, pass upon and determine the questions here presented. The public service commission, as constituted, is authorized to examine in the first instance and pass upon these problems. Appellants should seek their remedy before that tribunal. In *State ex rel. Hodgdon v. Hoquiam Water Co.*, 70 Wash. 682, 127 Pac. 304, this court, in sustaining the original jurisdiction of the superior court to com-

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pel a public service corporation to furnish water at a consumer's lot line, said:

"Counsel for respondent contends that the question here involved is within the exclusive original jurisdiction of the public service commission, and that therefore the superior court was without jurisdiction to determine this question in an action brought originally in that court. If the question involved only the reasonableness of the amount of the charge which the water company is here seeking to make, this contention might be regarded as sound; but since there is only involved the question of the right to make any such charge regardless of its amount, we think the superior court has jurisdiction."

The issue here presented is one of alleged discrimination in the matter of rates. Appellants contend that respondent's rates are unjust, unfair, and unreasonable, and that it has exacted rates of them in excess of those which it is exacting from other consumers. These charges, which, for the purposes of the demurrer, must be accepted as true, show that respondent is acting in violation of §§ 80 and 81 of the public utilities act (§ Rem. & Bal. Code, §§ 8626-80, 8626-81). Appellants, citing § 80 (Id., § 8626-80) of the act insist that they can obtain no relief from the public service commission, as no complaint can be entertained by that commission except on its own motion, unless such complaint is signed by the mayor or council of a municipal corporation, or by not less than twenty-five consumers or purchasers of water. The first portion of § 80 expressly provides that "complaint may be made . . . by any *person* . . . in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation . . . of any provision of law." If respondent is practicing discrimination in charging rates as alleged, it is doing an act in violation of the public utilities law and appellants may file a complaint with the commission. Appellants insist that, by reason of the proviso contained in § 80, they cannot file a complaint. The proviso reads as follows:

"Provided, That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service."

It is apparent that this proviso, considered in connection with other portions of the section, pertains only to complaints affecting the reasonableness of the schedule of rates or charges of a public service corporation, and that it does not negative the authority of any person to complain of a discrimination of which a corporation may be guilty. In any event, before the appellants could resort to the courts, they should ask the public service commission itself to file a complaint, or should apply to the municipal authorities to do so, or should endeavor to induce other consumers and purchasers to join them in filing the complaint. Appellants fail to allege that they have taken any such action.

The judgment is affirmed.

MOUNT, FULLERTON, PARKER, and MORRIS, JJ., concur.

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[No. 11399. Department Two. July 30, 1914.]

E. E. CROCKETT *et al.*, *Appellants*, v. NEELY & YOUNG,
INCORPORATED, *Respondent*.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—RECOVERY OF PRICE—FRAUD—EVIDENCE—SUFFICIENCY. Findings that a purchase of land was not induced by the fraudulent representations of the vendor as to its situation as sheltered from winds, its fertility and its suitability for growing vegetables and fruit by means of irrigation, and the character of a spring, etc., including the false use of a photograph of a man on his knees purporting to be standing in a field of alfalfa, are supported, where the testimony, although conflicting, fully sustained the truth of all the representations, the vendee had visited and personally inspected the land, which had been since resold at a large advance to a second purchaser, who was satisfied and successfully applying the land to the purposes for which it was originally sold, and the vendor was not aware of the deceptive use of the photograph of the alfalfa field, the raising of alfalfa being, in any event, outside the purpose of the vendee, and an immaterial matter.

SAME — MISREPRESENTATIONS — MATERIALITY. Misrepresentations by the vendor of land do not warrant a rescission by the purchaser, where, if intended as such, they were concerning an immaterial matter and without prejudice to the purchaser.

Appeal from a judgment of the superior court for King county, Myers, J., entered September 7, 1912, upon findings in favor of the defendant, in an action for rescission, tried to the court. Affirmed.

Reed & Hardman, for appellants.

A. E. Gallagher, for respondent.

Crow, C. J.—Action by E. E. Crockett and wife against Neely & Young, Inc., a corporation, to rescind a contract for the purchase of land and to recover purchase money. From a judgment in defendant's favor, the plaintiffs have appealed.

¹Reported in 141 Pac. 1143.

On January 17, 1908, the appellant E. E. Crockett made the following written application to purchase land from the respondent:

“Application for Purchase.

“The undersigned hereby makes application for, and agrees to purchase Fr. 7 and 85-100 acres of Block -4-, Section 19, Township 20 North, Range 23 E., containing 7.85 acres more or less according to the plat thereof, known as Crescent Irrigated Tracts at the price and terms set below, all deferred payments to draw interest at the rate of seven per cent (7%) per annum. Acres per acre 7.85 prices per acre, \$300. Total amount, \$2,355.00, and herewith tender the sum of \$20 as earnest money, receipt of which is hereby acknowledged by undersigned salesman. This application is subject to the approval of Neely & Young, Inc. \$765.00 January, 17th, 1908, being balance of first payment. \$785.00 January 17th, 1909, first deferred payment. \$785.00 January 17th, 1910, second deferred payment. Any and all payments can be made at any time and interest cease on amount paid. Regular land and water contract for said above described land to be issued by Neely & Young, Inc., at once or money refunded. Purchaser, E. E. Crockett, Address, 1281½ Taylor Ave., Seattle, Wash.”

Shortly thereafter, a formal contract of purchase was executed, which, *inter alia*, contained a stipulation that time was of its essence, and provided that, if the purchaser should fail to make payments at the times set forth, the vendor, upon thirty days' written notice, might declare the contract to be of no effect, in which event all payments theretofore made were to be forfeited to the vendor. Appellants made the payment which fell due on January 17th, 1908, and on or about July first, 1908, paid \$54 interest, together with the further sum of \$20 as a maintenance charge for water. No further payments were made. Appellants contend that, about September, 1908, they first discovered that appellant E. E. Crockett had been deceived and defrauded by certain false and fraudulent representations of respondent made by its selling agents; that, by reason thereof, they forthwith elected to rescind the contract, and demanded a return of their payments.

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On October 28, 1909, respondent, in writing, notified appellant E. E. Crockett that, unless all payments then delinquent were made within thirty days, it would elect to terminate the contract and declare the same null and void. Thereafter and on January 4, 1910, respondent instituted an action in the superior court of the state of Washington in and for Grant county, against the appellant E. E. Crockett to quiet title. Although served with process, appellant made default, and a decree was entered quieting the title.

On March 22, 1911, appellants commenced this action to rescind the contract and recover payments theretofore made. Respondent's lands, located on what is known as Crescent Bar, and of which the tract purchased is a part, are in Grant county, on the east side of the Columbia river. Water for irrigation is taken from the river by a pumping system and delivered on the land. High crescent-shaped cliffs or bluffs are located immediately east of the lands, and water for domestic use was to be obtained from a nearby spring located at a high point. The complaint alleges that respondent, through its selling agents, made the following false and fraudulent representations, upon which appellant E. E. Crockett relied: that the crescent-shaped cliffs partially surrounding the lands at Crescent Bar protected and sheltered them from winds, thereby preventing any drifting of sand or dust; that, by reason thereof, the lands were particularly valuable for growing vegetables and fruit; that there was a spring of water near the lands of great volume and exceptional purity, which would obviate the necessity of using Columbia river water for domestic purposes; that the system of irrigation installed upon Crescent Bar lands would furnish such an inexhaustible supply of water that plaintiffs and other owners would not be limited, but would be furnished with an abundant supply of water at all times during the irrigation season; and that respondent's agents exhibited to appellant a false photograph purporting to show a man standing in an alfalfa field, whereas he was in fact upon his knees. The com-

plaint further alleged that these representations were false and fraudulent; that the cliffs did not shelter the lands; that the spring water was impure and unfit for use; that the irrigation system was inadequate; and that the photograph was exhibited to appellant for the fraudulent purpose of making it appear that the growing alfalfa shown therein was much taller and more luxuriant than the facts warranted.

The case is before us for trial *de novo*, and the controlling issues presented are issues of fact. We have read all the evidence, and conclude that no false or fraudulent representations of a material character were made. Appellant introduced evidence which, if undisputed, might suggest certain false representations. It was, however, disputed, and the burden seems to have been well sustained by respondent. The evidence is convincing to the effect that respondent not only performed all of its covenants with appellant and other purchasers, but that it did more, sparing no reasonable expense or trouble. It is shown that the irrigation tracts were all that respondent claimed for them; that the spring water was pure and plentiful; that it was conveyed to the various tracts as agreed; that although, on certain occasions after heavy rains, it had been contaminated by unusual floods which carried animal and vegetable matter, respondent promptly cleansed the spring, repaired the distributing system and put the same in good condition; that the settlers voluntarily refrained from using the spring water during the summer season for the reason that it became warm from being carried a considerable distance in exposed pipes; that they preferred the Columbia river water which was then pure, available, cooler and more desirable; that the cliffs or bluffs did afford protection from frosts and against winds coming from the southeast, but not from winds coming down the river; that respondent did not say winds would not come from the latter direction; that appellants personally visited and examined the land before making any purchase; that the land was fertile and susceptible of a high degree of cultivation; that

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after respondent had forfeited appellants' contract for non-payment of installments due and had quieted its title, it sold the same tract to another purchaser for \$500 per acre as against \$300 per acre which appellant contracted to pay; and that the second purchaser, who was entirely satisfied, was successfully improving, developing and cultivating the land.

Appellants' main contention seems to be predicated upon the picture in which the man upon his knees appears to be standing. Before the time appellant E. E. Crockett made his purchase, a printed pamphlet advertising the land was used by respondent's agents and shown to appellant, in which the above mentioned picture appears. No reference is made in the pamphlet to the picture, nor is anything said therein as to what it was intended to show. Other pictures appear in the pamphlet showing conditions on Crescent Bar lands, but no contention is made that any of them are fraudulent.

The trial court found that the picture was deceptive in that the man was not standing, but was upon his knees, but further found that the deception was neither known to, nor authorized by, respondent. This finding is sustained by the evidence. Other photographs showing the development of these tracts, the fruit and vegetables grown thereon, the condition of the irrigation system, and the method of irrigation, were admitted in evidence. These pictures, without exception, show that respondent's scheme was successful. In many of them a growth of alfalfa is shown upon these lands much more luxuriant than the alfalfa in the picture of which the appellant complains. The evidence shows that the appellant E. E. Crockett is a seafaring man; that he has followed the sea for many years; that he lives in Seattle; that he desired to purchase the place as a home for himself and family when he determined to retire from his seafaring life; and that his intention was to raise vegetables and fruit. It does not appear that he wanted to raise alfalfa, or that he was defrauded by any false representations relative to the amount

or quality of alfalfa that could be raised upon the land. Under these circumstances, the representation made by the picture, if it amounted to a representation, was on an immaterial matter without prejudice to appellant. From the record, we are unable to find that respondent made any false or fraudulent representations to appellants' damage.

The judgment is affirmed.

MOUNT, PARKER, MORRIS, and FULLERTON, JJ., concur.

[No. 11841. Department Two. July 30, 1914.]

A. E. COLBURN, *Respondent*, v. WASHINGTON STATE ART ASSOCIATION, *Appellant*.¹

BAILMENT—LOSS OF GOODS—LIABILITY OF BAILEE. Where goods are placed on exhibition in defendant's museum at defendant's request, and the evidence fails to show that they were placed there under a contract amounting to a warranty for their return, the transaction is a bailment for the mutual benefit of both parties, hence the defendant is bound to exercise ordinary diligence only, and is liable accordingly in the event of loss or damage to the goods.

SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In such case, the evidence is insufficient to show negligence of the bailee in guarding against loss of the goods by theft, where the articles exhibited were placed in the museum for the mutual benefit of the parties, the plaintiff himself directing and assisting in arranging the exhibit, and, upon objecting to the manner of securing the show case in which the articles were placed, finally consented to the use of wire fastenings instead of a padlock, being told that the method employed was equally as safe and that a watchman was employed, and it was further shown that the plaintiff visited the museum and saw his goods several times prior to the theft, and that he was free to remove them at any time he desired.

BAILMENT—LOSS OF GOODS—NEGLIGENCE—BURDEN OF PROOF. In an action to recover for loss of articles placed in defendant's care for exhibition purposes, there is a presumption of negligence from their loss, but where the bailee shows the loss to have resulted by theft of

¹Reported in 141 Pac. 1153.

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third parties, he thereby meets the *prima facie* case against him for failure or refusal to deliver the articles, and the burden of proof as to his negligence then rests upon the plaintiff.

SAME—NEGLIGENCE—ASSUMPTION OF RISK. The plaintiff cannot recover from a bailee for the loss of goods by theft, on the ground that permission was denied him to put a padlock on the case in which the goods were kept, where it was shown that he voluntarily placed and left them there for exhibition, and knew the manner in which the case was fastened, thereby assuming the risk in that respect.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 18, 1913, upon findings in favor of the plaintiff, in an action on implied contract, tried to the court. Reversed.

Claude E. Stevens (Roney & Loveless, of counsel), for appellant.

Elias A. Wright and *Sam A. Wright*, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages resulting from the loss of certain of his goods by theft while they were on exhibition in the defendant's museum among curios and works of art belonging to it and others. The plaintiff's claim seems to be principally rested upon the theory that his goods were in the possession of the defendant as a mere loan for its sole benefit under an agreement by it to return them, amounting to a guaranty to make such return, and that, in any event, the defendant's negligence was the cause of the loss of the goods, rendering it liable for their value if it be held that they were there on exhibition under an agreement amounting to one of bailment for the mutual benefit of both plaintiff and defendant. A trial before the court without a jury resulted in findings and judgment against the defendant for the sum of \$188, the value of so much of the goods as were stolen and not recovered. From this judgment, the defendant has appealed.

Appellant is a corporation, and maintains, in Seattle, a museum for the exhibition of curios, works of art, etc. It is

not a corporation maintaining a business for profit in a commercial sense. It is maintained by donations, membership fees, and admissions charged to others than its members. While it has curios and works of art of its own on exhibition, many of its exhibits belong to others and are placed in its museum either as a mere loan, or in pursuance of agreements with owners mutually beneficial to it and such owners.

Respondent is a lapidary and manufacturer of jewelry, maintaining a place of business in Seattle. In February, 1912, a Mr. Charbeneau, one of the curators of appellant, visited respondent at his place of business, and invited him to put some of his goods on exhibition in the rooms of appellant. Respondent's own version of this visit and the placing of his goods on exhibition is as follows:

"He came in there one afternoon and called on me and said that they were going to open up the museum in a day or two, and he said that they wanted to make the best showing possible down there and he would like to have me put an exhibit down there. He said that they had a showcase that they did not have anything to put in and that they would like to have me put some good stones in it and make an exhibit something like I had at the A. Y. P. Fair and the Chamber of Commerce. I told him I did not have much time to make an exhibit in two or three days, and that I would have to take my stock if I did it. He said that they wanted to make a good showing, and he said if I would bring down some stuff they would give me the showcase and see that the goods were well taken care of, and that he would be glad to have me make an exhibit. I told him that I did not have the time, and he insisted on doing it. I said, 'What would there be in it, suppose I did?' He said, 'We can do a lot of advertising for you. You can have cards and put a sign on the place. It is something unusual. We don't usually permit that, and you can make a good many customers that way.' 'Bring the stuff and make a showing.' I took Mr. Lempke and introduced him to Mr. Charbeneau. Mr. Lempke was cutting cameos at my place at the same time, and Lempke liked that and he wanted me to make an exhibit of cameos at the time I had the exhibit; and he wanted us to make an exhibit together; and either that day or the next I went to Mr. Berg,

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(appellant's agent in charge of exhibits) and asked him to show me the case that he had, and Mr. Berg took me down and showed me the case. I told him that it was necessary to have the best light possible. He said that that was the best location that he had in the room, and that he would give it to me for that occasion; and we got up the stuff and took it down there and made the exhibit. I took the boys down there to help me out in the afternoon. The case hadn't been dressed, or anything. I took Albert Wilson and Lempke. They went down with me. We went to work and decorated the goods, and Albert Wilson arranged the stuff, and there wasn't any way to lock up the case that I could see. I asked Mr. Berg if I could put a padlock on the cases. He said the cases were all locked with wire at the bottoms that places the two backs of the cases together and put wires around the legs, twisted around, and he said the show cases were borrowed and he would rather not mar them up in any way. He said they were perfectly secure that way, wired, and that there was a watchman there all the time, and there would be no danger. . . . I asked him, when they went down there, 'What is in it?' and he says, 'You can put your cards down there. It is positively against our rules, but if you make a good exhibit I will let you put your cards there' . . . I put a box of them on the counter. . . . I went down there and asked Mr. Berg to show me the case we were to put the exhibit in and he took me down and showed it to me, and I told him that one of the main things was to have a good light, to show up the stones . . . He told me I could take it where I liked best."

The case in which the respondent's goods were placed, as well as those of others, had doors at the back as the only means of entrance. This case and another similar one were placed back to back so the doors could not be opened nor the cases entered without separating them. The legs of the cases were then securely wired together. Respondent testified, touching this matter, as follows:

"That was Mr. Berg's way of fastening all the cases, and he got us the wire and pliers and put it together that way. I wanted to put a padlock on, and I took a lock up there to put on. I have got it in my pocket, and Mr. Berg didn't

want the cases marred; he would not let me. I told him it wasn't a very secure way of fastening. He said there was a watchman there and it was perfectly safe."

Other evidence, we think, shows that this method of securing the respondent's case against entrance was as effectual as the locking of it by a padlock in the manner suggested by appellant would have been, and made it fully as difficult of entry by one evilly disposed. In any event, it is apparent that respondent knew at the time that the case containing his goods was to be, and was in fact, so secured. Respondent's exhibit consisted of articles of moderate value, no one of which exceeded \$6 in value, as indicated by his complaint, being rings, brooches and tie pins containing stone sets, and also some cut stones separately. It seems to have been the principal purpose of the exhibit to show Washington state gems and their adaptive use in the manufacture of jewelry. No list of the articles placed there by respondent was furnished to appellant, nor was any receipt given by appellant to respondent therefor. On this subject, respondent testified as follows:

"Q. When you placed that exhibit down there did you give Mr. Berg a list of the articles in there? A. He never asked for any. Q. Did you give him one? A. No, sir. Q. Did he ever give you a receipt for anything you placed in there? A. No. He gave me a guaranty that the stuff would be safe."

Thereafter, respondent visited the museum and saw his goods several times prior to the theft. His goods were placed there without any agreement as to their remaining any particular time. It is plain from the evidence that he was free to remove them at any time he desired. On August 4, 1912, about six months after placing the goods on exhibition, some \$200 worth of them were stolen from the case in which they were exhibited. This was accomplished by the removal of the wire fastenings on the legs of the cases, and pushing them apart at one end so the doors could be opened. Arthur E.

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Hall, who was in charge of the museum for appellant on that day, testified as to what then occurred as follows:

"On this particular afternoon, I kept watch over the museum as much as possible. . . . I noticed two young fellows coming out of the front gallery. They looked suspicious, and I followed them out on the street. I saw them go up the street, those I was watching, and I went back downstairs and when I got back downstairs I saw that something was wrong with the cases. I looked up and I could see at a glance that articles were gone. I did not know how many were gone. I came back upstairs and informed the stenographer that was there that I was going down the street to try to follow those boys. I was unsuccessful, and I brought a policeman back with me,—I believe Mr. Platt was there at the time, and I explained it to him, and the police said the best thing to do is to go down and see Mr. Tennant, I believe, the head of the detectives."

This, apparently, is all the information that appellant's officers or servants had as to the removal of respondent's goods by theft prior to their actual taking. It is also substantially all of the information the record furnishes us as to the degree of care or want of care exercised by appellant over respondent's goods until the time they were actually stolen. There is considerable evidence in the record concerning the efforts of appellant and the police looking to the recovery of respondent's goods after they were stolen, but we see nothing in this evidence that points to negligence on the part of appellant. Some complaint is made that appellant did not inform respondent of the fact that his goods had been stolen as promptly as it should, but the evidence also indicates that, even after he was so informed, he did not lend that assistance towards their recovery or bringing the thief to justice that he should. Among other things, he neglected to go to the officers who had recovered some of the goods and identify them, though he was informed that some of the goods were in the officers' possession. However, as to these facts occurring after the goods were actually stolen, we think they

are of too slight consequence touching the question of the appellant's negligence to be seriously considered here.

We think the foregoing is as favorable a statement of the controlling facts touching appellant's liability as can be made from the evidence before us. It is substantially, as we have noticed, respondent's own version of the affair, except as to Hall's statement of what occurred at the time of the theft. This version of respondent is contradicted in several particulars by the testimony of officers of appellant, especially as to the degree of care and responsibility which appellant agreed to exercise and assume as to respondent's property; but, since we are constrained to dispose of the cause in appellant's favor upon the facts as above summarized, we take no account of this conflict in the evidence.

Were the goods placed upon exhibition under a contract amounting to a warranty for their return on the part of appellant, as claimed by respondent? We think not. It is true that respondent testified, after stating the manner of placing the goods on exhibition, and conversation occurring between him and appellant's servant, that "he gave me a guaranty that the stuff would be safe." It is manifest, however, that this is only respondent's own conclusion from what then occurred. He gives no conversation or statement on the part of any of appellant's servants evidencing, as we view it, in any degree, any such a contract. It seems quite clear to us from the facts we have narrated that this was nothing more than a bailment for the mutual benefit of both appellant and respondent. This being the nature of the relation between them then created, it seems plain, under well settled rules of law, that appellant was bound to exercise ordinary diligence only, and would become liable accordingly in the event of loss or damage to respondent's goods. Van Zile, *Bailments* (2d ed.), §§ 34 and 35; Hale, *Bailments*, p. 24; *Firemen's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N. W. 507, Ann. Cas. 1913 E. 823, 45 L. R. A. (N. S.) 314. We conclude that appellant's duty required of it only ordinary diligence. The trial court

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evidently, as appears from its findings, entertained this view, but disposed of the cause in favor of respondent upon the theory that appellant's want of ordinary diligence was the proximate cause of the loss of respondent's goods by theft.

Is appellant liable by reason of its negligence? We are constrained to hold that it is not, in view of the facts and circumstances we have above summarized, being, in substance, respondent's own version of the facts; and that appellant did exercise such reasonable care as was required by it under the law. Counsel for respondent invoke the general rule that, in an action to recover damages against a bailee for goods placed in his possession, which goods are not accounted for in any manner and not returned to the bailor upon demand, the burden of proof, as against his presumed negligence, then rests upon the bailee. This rule was recognized by this court in *Pregent v. Mills*, 51 Wash. 187, 98 Pac. 328, but it is not without its limitations in cases of loss by burglary, larceny, fire, and other causes which, of themselves, do not point to negligence on the part of the bailee. In other words, when the bailee has shown loss from some such cause, he has met the *prima facie* case of negligence made against him by his failure to return the goods, and the burden of proof as to his negligence then rests upon the plaintiff as in any other case of alleged negligence. In *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, Judge Hand, speaking for the court, touching the liability of a bailee for loss of goods by a burglary, said:

"The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of Sutherland, J., in *Schmidt v. Blood*, where 'there is a total default in delivering or accounting for the goods,' (9 Wend. 268) this is to be treated as *prima facie* evidence of negligence. (*Fairfax v. N. Y. C. and H. R. R. Co.*, 67 N. Y. 11; *Steers v. Liverpool Steamship Co.*, 57 id. 1; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184.) This rule proceeds either from the assumed necessity of the case, it being presumed that the

bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

"But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. (*Lamb v. Camden and Amboy R. R. Co.*, 46 N. Y. 271, and cases there cited; *Schmidt v. Blood*, 9 Wend. 268; *Platt v. Hibbard*, 7 Cow. 500. . . .

"It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real 'shifting' of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman."

The New York courts have adhered to these views in the later cases of *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; and *Campbell v. Klein*, 101 N. Y. Supp. 577. In *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92, 66 Am. St. 375, it is said:

"Upon this record, the defendant has established the fact and circumstances of the theft, without contradiction. There is no presumption of negligence from the mere fact of the

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loss or theft, and while there is much reason for the rule, adhered to in many states, that the defendant has the burden of proving the fact of loss, it does not necessarily follow that a presumption of negligence arises; and, if the facts shown in connection therewith do not fail to excuse, the *onus* is on the plaintiffs to shake defendant's exculpation. This does not deny the proposition that when the bailment is proved, and a refusal to deliver is established, the plaintiff has made out a *prima facie* case, and the inference of wrong by the defendant follows, or that it is then for the defendant to explain the loss and exonerate himself, which he may do by showing circumstances which *prima facie* excuse the failure to deliver. To this extent, and in this sense, a burden rests upon the defendant; but, if this question of fact becomes a disputed one, the evidence of the plaintiff must preponderate."

See, also, *Carlyon v. Fitzhenry*, 2 Ariz. 266, 15 Pac. 273; *Sanford v. Kimball*, 106 Me. 355, 76 Atl. 890, 138 Am. St. 345; Van Zile, *Bailments* (2d ed.), § 34, and note; 5 Cyc. 217. In *Schouler's Bailments* (3d ed.), § 23, the learned author reviews this subject at some length, concluding his observations as follows:

"All bailees, with or without a special contract, are *prima facie* excused, when they show loss or injury by act of God or of public enemies; and ordinary bailees in a variety of lesser instances, such as fire, loss by mobs, or robbery. Common carriers and innkeepers, as we shall see hereafter, have to bear, apart from special contracts and our later legislation, a variety of risks such as would in no sense impute to them positive negligence or misconduct."

Having in mind these rules touching the burden of proof, and the fact that we have practically no evidence save that of witness Hall above quoted showing the amount of diligence or want of diligence exercised by appellant in caring for respondent's goods, and the conceded fact that they were lost by theft, it seems to us that there is such want of affirmative showing of negligence on the part of appellant that it must be held free from liability such as is here sought to be charged against it.

So far as respondent's being prevented by appellant from putting a lock upon the case is concerned, we think, in view of the fact that he voluntarily placed and left, in the case, his goods, knowing the manner the case was fastened in lieu of a lock, he assumed the risk in so far as the mere manner of fastening the doors of the case is concerned. He manifestly consented to this manner of fastening the doors; and besides, as we have said, the evidence indicates that it, in any event, was as secure a manner of fastening the case as that proposed by respondent would have been. It was also the usual manner of fastening such cases, which respondent knew.

Our attention is called by counsel for respondent to *Vigo Agricultural Soc. v. Brumfiel*, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657, involving the loan of a gun for exhibition, which was placed in a building without any guard or police protection at all in or about the building, the society expressly agreeing that it "will keep an efficient police force on the grounds day and night to take care of articles on exhibition." It affirmatively appeared from the evidence in that case that no policemen or watchmen whatever were kept in or about the building, and it was treated as though nothing of value were stored therein. Upon this theory, apparently, the society was held liable for the loss of the gun. Manifestly, it neglected to do the very thing it expressly promised to do, and thus incurred liability as for negligence. In the case before us, there is no evidence worthy of serious consideration affirmatively showing that appellant did not do all it promised to do, and the loss being concededly by theft, the burden of showing appellant's negligence was upon the respondent. The case last noticed comes as near lending support to respondent's contention as any which counsel have called to our attention. We conclude that the judgment of the trial court must be reversed and the cause dismissed.

It is so ordered.

CROW, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

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Statement of Case.

[No. 11937. Department Two. July 30, 1914.]

THOMAS SINNES, *Appellant*, v. FLOYD L. DAGGETT *et al.*, as
*Commissioners of the Industrial Insurance Department etc., Respondents.*¹

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERMANENT PARTIAL DISABILITY—STATUTES—CONSTRUCTION. A workman injured while engaged in a hazardous occupation is not entitled to an award by the industrial insurance commission as for "permanent total disability," but can recover for "permanent partial disability," where his injuries resulted in the loss of portions of his fingers, subd. (b) of the act, 3 Rem. & Bal. Code, § 6604-5, expressly defining permanent total disability as the loss of both legs or both arms, one leg or one arm, total loss of eyesight, etc., and subd. (f) defining permanent partial disability as the loss of one foot, one leg, one hand . . . "one or more fingers," etc.

SAME—AWARD FOR INJURIES—DISCRETION OF COMMISSIONERS—REVIEW BY COURT. Under subd. (f) of § 5 of the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-5, defining permanent partial disability of an employee engaged in a hazardous occupation, and prescribing that the award be paid in a lump sum, but never to exceed \$1,500, to be decided by the department, and § 20 of the act (Id., § 6604-20) providing for a review of decisions of the department, so far as such decision rests upon questions of fact, etc., the amount of the award is within the discretion of the department, and will not be reviewed, in the absence of capricious or arbitrary action in fixing the same, especially where the amount allowed the employee was \$1,200.

COURTS—POWER TO CORRECT ERROR—INTERLOCUTORY ORDERS—CONCLUSIVENESS. Where, prior to final hearing on an appeal from a decision of the industrial insurance department, the then presiding judge awarded appellant a jury trial, and at the final hearing another judge overruled the holding of the former judge, the first ruling was not conclusive, but was an interlocutory order subject to change and correction before final disposition of the cause.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 5, 1914, dismissing an appeal from an award made by the industrial insurance commission, on objection to the jurisdiction. Affirmed.

¹Reported in 142 Pac. 5.

Arctander & Jacobsen, for appellant.

The Attorney General and John M. Wilson, Assistant, for respondents.

PARKER, J.—This is an appeal from a judgment of the superior court for King county, disposing of an appeal to that court from an award made to appellant by the industrial insurance commissioners, for injuries received by him while engaged in a hazardous occupation.

In his complaint, filed in the superior court upon his appeal from the award of the commissioners, appellant alleges:

“That at all times herein mentioned the above named claimant and appellant was employed by the said Moore Logging Co. and worked for it in its said logging camp as a common workman or more particularly in the capacity of a ‘chaser;’ that such employment and work were extra hazardous in character as defined by that certain act relating to compensation for injured workmen, commonly known as the workmen’s compensation act and being chapter 74 of the Session Laws of the state of Washington for the year 1911.

“That while claimant and appellant was so engaged and working in said place in said capacity and employment, he was, by reason of negligence attributable to the said logging company, severely and permanently injured and permanently and totally disabled, the injuries so sustained being more particularly as follows, to wit: that the first finger of his right hand has been cut off immediately above the last joint; that the three other fingers of said hand have all been cut off at and below the last joint; that the first finger of the left hand has been cut off shortly below the first joint, and the three other fingers have been entirely lost; that whatever stumps remain of the fingers on his two hands as aforesaid are and will forever remain stiff and entirely useless . . .

“That thereafter the said claimant and appellant duly filed with the said industrial insurance department his application for compensation for said injuries under the said workmen’s compensation act and in all respects complied with its provisions in regard thereto.

“That on the 20th day of September, 1913, the said respondents rendered their decision on said application for

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compensation, awarding to the said claimant \$45 for time loss of one month and one-half and the further sum of \$1,200 for permanent partial disability.

"That said decision is erroneous and does not give to the said claimant and appellant the full measure of what he is entitled to under the facts and the law; that said award is inadequate both as to permanent partial disability as well as to permanent total disability; that said decision is not a proper application of the provisions of the said compensation act, and contrary to the facts."

When the cause came on for hearing in the superior court, counsel for the commissioners objected to a trial by a jury, which had been previously demanded by counsel for appellant, and moved for a dismissal of the appeal upon the ground, in substance, that no question of fact was involved therein triable in the superior court, and that the facts alleged in the appellant's complaint did not show any error of law committed by the commissioners in making the award to appellant. The cause was disposed of by the court upon this ground in favor of the commissioners, leaving their award to appellant undisturbed.

Counsel for appellant contend that he is entitled to an award as for "permanent total disability," and that the commissioners erred in making his award, as they did, for "permanent partial disability" only. It is true, appellant alleges in his complaint that he was "permanently and totally disabled," but when we look to his allegations specifically describing his injuries, we find that they consist only of the loss of his fingers, or, rather, portions thereof. This, by the express language of the compensation law, as we read it, amounts only to "permanent partial disability." Subdivision (b) of § 5, page 358, Laws of 1911 (3 Rem. & Bal. Code, § 6604-5), reads:

"(b) Permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the workman from performing any work at any gainful

occupation." (Followed by specifications of compensation to be paid under varying conditions.)

Subdivision (f) of the same section reads:

"Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, *one or more fingers*, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of fifteen hundred dollars (\$1,500). The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum."

We italicize the words of the law especially applicable here. Reading these two provisions together, it seems clear to us that it must be determined, as a matter of law, from the allegations of appellant's complaint, that his injuries consisted only of "permanent partial disability," since they consisted of the loss of portions of his fingers. It is not claimed that he was otherwise injured. Even if trial by jury were a matter of right upon questions of fact in an appeal from an award made by the commissioners (as it is not, by the express provisions of section 20 of the law), the question here presented would still be one of law, determinable by the court, and not by a jury. We are of the opinion that the trial court correctly affirmed the decision of the commissioners, holding that appellant's injuries constituted "permanent partial disability" only.

It is contended that the commissioners, in any event, erred in not awarding appellant the maximum of \$1,500, prescribed by the permanent partial disability provision above quoted. Section 20 of the act reads:

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"Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence . . . in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review." 3 Rem. & Bal. Code, § 6604-20.

Manifestly, the amount of the award was within the discretion of the commissioners, limited only by the prescribed maximum of \$1,500. Clearly, the court would not be warranted in disturbing the decision of the commissioners upon a question of this nature, unless, possibly, their decision might be reviewed by the courts upon such a question were they charged with capricious or arbitrary action in fixing the amount of their award. No such claim is made against the commissioners upon this appeal. To what extent their decisions might be reviewed and controlled by the courts for such a cause, we are not called upon to determine at this time. Manifestly, an award so near the maximum amount as this award is does not evidence, within itself, arbitrary or capricious action on the part of the commissioners.

Some time prior to the final hearing in the superior court, appellant filed a written demand for a jury trial. Objections were filed thereto by counsel for the commissioners. At that time, the then presiding judge overruled the objections of counsel for the commissioners, thus, in effect, awarding appellant a jury trial. Another judge of the same court presided at the final hearing and, as we have seen, his ruling and decision at that time, in effect, overruled the holding as to appellant's right to a jury trial previously made. Some contention is now made that the first ruling was conclusive and binding, and should have controlled at the final hearing. We do not think so. Such interlocutory rulings are subject to change and correction before the final disposition of a cause

in which they are made, and the fact that such rulings have been made by another judge of the court is of no consequence. *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256; and *Philips & Co. v. Langlow*, 55 Wash. 385, 104 Pac. 610. We conclude that the judgment of the superior court must be affirmed.

It is so ordered.

Crow, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

[No. 11947. Department Two. July 30, 1914.]

MARY A. HOBBS, as *Administratrix etc.*, *Respondent*, v.

GREAT NORTHERN RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. A verdict cannot be sustained for wrongful death of a minor employed as a hostler's helper, who was killed while on the pilot of an engine during a collision, where the testimony of plaintiff's witnesses as to the reason for his presence there was purely speculative, and it was clearly established that he was not in the performance of his duties, and was violating a rule forbidding employees to ride on engine pilots.

EVIDENCE—HEARSAY—RES GESTAE. Evidence of statements made by an employee after an injury resulting in his death is not admissible as part of the *res gestae*, where they in no way explained or characterized the main fact, but were concerning what happened just prior to the accident, being merely the narration of a past event.

MASTER AND SERVANT—FEDERAL EMPLOYEE'S LIABILITY ACT—SCOPE OF EMPLOYMENT. A recovery cannot be had under the Federal Employer's Liability Act for the wrongful death of an employee while on the pilot of an engine, by merely showing the injury and that the employee was at the time engaged in interstate commerce, nor in the absence of negligence occasioning the injury; and the duty to furnish the servant a safe place in which to work not extending to places where he is not required or expected to be in performing his duties, it is incumbent upon the plaintiff to show that the servant was, at the time of the injury, engaged in some act incidental to his employment.

¹Reported in 142 Pac. 20.

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Appeal from a judgment of the superior court for King county, Dykeman, J., entered October 14, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

F. V. Brown and F. G. Dorety, for appellant.

Arthur E. Griffin, for respondent.

MORRIS, J.—Respondent brought her action under the Federal employers' liability act, to recover for the death of her minor son who was a hostler's helper in appellant's employ in its Interbay yards, Seattle. The accident, resulting in the death of the minor, Charles Hargraves, happened about seven a. m., November 16, 1912. The deceased was a member of the night crew, and had been assisting in preparing the engines to go out upon the road, by providing them with fuel oil, sand, and water. His work was ended at seven o'clock, when the day crew came on duty. The last work he was engaged in concerning which there was no dispute was putting sand in an engine which then stood at the sand house. There is some dispute as to whether the sand was being placed in the dome of the engine or behind the firebox door, but this is immaterial, as it is apparent that, whether the sand was being placed in the dome or in the rear of the cab, it would not call for deceased's presence at the place where he was when he received his injury. At this time, engine 960 was standing on the round house track, and a switch engine was standing on a store house track, connecting with the round house track, so close to the frog that it was not in the clear. Engine 960 was being prepared for passenger service, and at the proper time was supposed to back down to the depot, when the switch engine was to take its place and obtain its supply of sand and water. For some reason, upon which the evidence is in conflict, engine 960 moved forward a short distance until its pilot collided with the foot board at the rear of the switching engine.

At the time of the collision, Hargraves was standing on the pilot of engine 960, and received injuries resulting in his death. It seems to be admitted that, because of the amount of steam from the engines, Hargraves' position upon the pilot of 960 could not be seen by the crew of either engine, and there is no contention that the engineer or the fireman of either engine knew he was on the pilot. As above stated, the last work of the deceased, prior to his getting upon the pilot, was assisting in filling up the sand box. The only positive testimony is that, after completing this work, Hargraves pulled a plank which connected the sand house platform with the running board of the engine upon which they were at work, back to the platform, and was standing on the platform, while another hostler's helper who had been assisting him went to the water tank near by to perform other duties. The next appearance of Hargraves was on the ground near to the pilot of engine 960. How he got there or what he was doing there no one seems to know. He was then seen to step upon the pilot of engine 960 as it moved forward, facing the rear and then turning around towards the round house. No one knows why he stepped upon the pilot, nor do any of those who saw him testify that he was doing anything when the engine moved forward. Some of those standing near saw the probability of a collision with the switch engine and shouted a warning, to which he paid no attention, either not hearing or not heeding it.

So far as we can discover from this record, Hargraves had no duties to perform which would take him upon the pilot of the engine at this time, and the reason for his presence there is a matter of conjecture. It is shown that there was a rule posted in the round house forbidding employees to ride on engine pilots, and that, in addition to this rule, Hargraves, who had been in the employ of the company for only about a month, had on two occasions been told by the hostler not to ride on the pilot. If the deceased was at work at the time he received his injury, in the performance of some required duty,

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this verdict must be sustained. With that view we have carefully examined the record to ascertain, if possible, what the deceased was doing upon the pilot, or what he purposed to do when he went there; and we can find nothing which refutes the positive testimony that he had no duties to perform which would take him there, or of those eyewitnesses to his position on the pilot that he was not performing any at the time.

One of the witnesses for the plaintiff gives it as his opinion, or as he puts it "my idea," that, after the plank used in filling the sand box was taken down, Hargraves walked along the running board to the front of the engine and then stepped down to the pilot, supporting his theory by saying he did not have the time to get down to the ground and walk around to the front end of the engine. But this is only speculation, and is refuted by the testimony of a number of witnesses who saw him step from the ground to the pilot as the engine moved forward. Another theory offered by respondent is that deceased was on the pilot for the purpose of oiling a relief valve. Neither of these theories is supported by any testimony. They are nothing more than conjectures as to what he might have been doing. On the other hand, the testimony of all those who saw Hargraves just before he received his injury is, not only that he was standing on the ground when engine 960 started to move, and that he stepped upon the pilot from the ground, but that he had no oil can or other appliance in his hand. This is supported by testimony that it was no part of his duty, or of the hostler's crew, to oil the relief valve, and that he had no access to the lubricating oil.

If there was any conflicting testimony upon this point, the jury might have disregarded this testimony as we have referred to it, and found otherwise. But respondent offers no conflicting testimony; she contents herself with testimony that is purely speculative, and points out only what he might have been doing. We do not think the jury, without supporting testimony, should be permitted to speculate as to what Hargraves might have been doing, when the testimony of all

the eyewitnesses points clearly to what he was doing; nor that they should theorize as to how he reached his position on the pilot when there is no conflict on that point. *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016; *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870.

Appellant also offers testimony to the effect that it would be impossible to oil a relief valve of the type on engine 960 from the place where the deceased stood or with the engine standing still. The deceased was five feet eight inches tall. The relief valve upon the engine was eight feet from where he stood. Appellant's testimony is all to the effect that the relief valve could not be reached by Hargraves from the position in which he stood. This is not only the evidence of appellant; but a locomotive engineer, introduced by respondent for the purpose of giving expert testimony, admits that the relief valve on this engine could not be reached by a person standing in the position of Hargraves. The only testimony we can find as to oiling relief valves from the pilot is that of one witness who says it could be done by standing on the pilot beam and leaning over and holding onto a brace. But the evidence shows that Hargraves was standing on the foot board and not on the pilot beam. Had he been on the pilot beam, he would not have been injured, as the impact of the collision was very slight, resulting in no appreciable damage to either engine. Another witness testified that this type of valve could be oiled with the engine standing still, by taking a wrench and turning the valve up, putting a stick under the cap of the steam chest, pushing the plunger down, and pouring in oil. This testimony is all speculative so far as it furnishes any guide to what Hargraves was doing, and is in direct conflict with the testimony of all those who were present at the time and testified to what he was actually doing at the time. It might have been done in the manner described by this witness, but there is no evidence that Hargraves was making any such attempt. He had neither oil can, wrench,

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nor stick, and, in addition, had changed his position so that his back was toward the relief valve.

Counsel for respondent, in his argument, asks, "If he was not oiling the engine, why was he there?" As we view the law, it is incumbent upon respondent to show what Hargraves was doing, and that, at the time of his injury, he was in the performance of some duty owing to the appellant; and not for appellant to make some affirmative showing to relieve it from liability. From the record, the only possible answer to the question is that he was not oiling the relief valve, and his purpose in stepping upon the pilot is a pure guess.

After the injury to Hargraves, he was taken to the hospital, where his mother arrived about 10:30, shortly before his death. She was interrogated as to his condition while she was there, and the record of her testimony is in part as follows:

"Q. Was he fully conscious when you got there? A. No, he was only semi-conscious. At the same time, if I spoke to him I was able to kind of bring him to for a minute. He seemed to know me, but immediately he was gone again. He raved continually about his work principally. Q. Did he seem to be fully conscious? A. I believed he was when I spoke to him first. Q. What did he say to you when you got there, Mrs. Hobbs?"

Counsel for appellant here made an objection which, after some discussion on the part of respective counsel, was overruled, and the question was renewed:

"Q. Just state what your son said to you, Mrs. Hobbs, as to what he was doing at the time he was injured. A. He told me that he was applying oil to the relief valve. Q. What did he say in regard to its being the last work that he had to do? A. He said, 'Mamma, I was just finishing. I was applying oil to the relief valve and then I was through.'"

The admission of this testimony is now urged as error. If admissible at all, it can only be upon the theory that it was part of the *res gestae*, since dying declarations are admissible as such only in cases of felonious homicide. It is difficult to

define the doctrine of *res gestae* so as to fit every case in which it is sought to be applied. The distinguishing feature of statements or declarations admissible under this rule is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparation for or emanations of such act. Such incidents, whether acts or declarations, become in this way evidence of the character of the main act as illustrating or explaining that act. Jones, Evidence, § 334. In *Henry v. Seattle Elec. Co.*, 55 Wash. 444, 104 Pac. 776, we laid down this rule:

"In order to be a part of the *res gestae*, the subsequent declaration must explain or in some way characterize the main fact. It must not be the narration of a past event, nor the expression of an opinion."

What was the "main fact" or "things done" in this case? The only possible answer is the coming together of these two engines and the consequent injury to Hargraves. This was the litigated fact upon which it was sought to establish the cause of action. The declaration of Hargraves did not explain nor characterize this main fact. It offered no explanation of the reason why the engines came together. It in no way characterizes what happened when they did come together. It illustrated neither cause nor effect. It can only be characterized as a statement of what Hargraves was doing just prior to the declaration, in no way connected with it; and as such it was a narration of a past event. The mere fact that, if Hargraves had survived his injuries and sought recovery against appellant, it would have been competent for him to testify to what he was doing at the time, does not establish its admissibility as a part of the *res gestae*. The admissibility of evidence is not to be determined by such a test, for witnesses oftentimes testify to facts which those to whom they have related them may not testify to without violating the rule against hearsay evidence. For these reasons we are of the opinion that this evidence was improperly admitted, and

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that it cannot be considered in determining the question submitted by this appeal.

One of the leading cases upon this point, cited as authoritative by the courts and textwriters, is *Waldels v. New York, C. & H. R. R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41, where a deaf mute was fatally injured by one of defendant's trains. About thirty minutes after the accident, he made certain statements to his brother to which, over objection, the brother testified as follows: "John said he got hit. John said there was a long train; that he stood waiting for it to go and an engine followed and struck him." The admission was held error and the declaration no part of the *res gestae*; the court giving as its reason for the holding that the *res gestae* was the accident; that the declarations were not part of that, did not characterize it nor throw any light upon it, but were purely narrative, giving an account of a transaction wholly past, and depending for their truth wholly upon the accuracy and reliability of the deceased and the verity of the witness who testified to it. The court then enters upon a discussion of the rule, reviewing many cases supporting these declarations. If the declaration in that case was the narration of a past event and not admissible as part of the *res gestae*, how can we otherwise characterize the declaration in this case? There the declaration was as to what happened just prior to the accident but not explaining it; here the declaration is of the same nature. In that case, the deceased stated that he was waiting for a long train to pass and was struck by an engine following; here the declaration was that he was applying oil to the relief valve and then he was through. Each case narrates a past event which must be covered by the same rule. If there is any distinction between the two cases in respondent's favor, it is to be found in the cited case, because of the fact that the declaration there is stronger in favor of her contention in that it contained a statement that the deceased was struck by an engine following the long train, and to that extent might be said to state

the cause of the injury, were it not narrative in character. But the case before us is that much weaker in that it does not purport to explain the accident, nor illustrate it. Many authorities might be cited, but the following are sufficient to illustrate the rule here applicable: *Steinhofel v. Chicago, M. & St. P. R. Co.*, 92 Wis. 123, 65 N. W. 852; *Johnston v. Oregon S. L. & U. N. R. Co.*, 23 Ore. 94, 31 Pac. 283; *Tennis v. Interstate Consolidated Rapid-Transit R. Co.*, 45 Kan. 503, 25 Pac. 876; *Corder v. Talbott*, 14 W. Va. 277; *Wagner v. Clausen & Son Brewing Co.*, 146 App. Div. 70, 130 N. Y. Supp. 584; *Gebus v. Milwaukee, St. P. & S. S. M. R. Co.*, 22 N. D. 29, 132 N. W. 227; *Kehan v. Washington R. & Elec. Co.*, 28 App. D. C. 108; Jones, Evidence (2d ed.), § 345; note to *Walters v. Spokane Int. R. Co.*, 58 Wash. 293, 108 Pac. 593, 42 L. R. A. (N. S.) 918.

Respondent cites the following cases from this court as sustaining the admissibility of this declaration: *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 82 Pac. 113, 4 L. R. A. (N. S.) 636; *Walters v. Spokane Int. R. Co.*, 58 Wash. 293, 108 Pac. 593, 42 L. R. A. (N. S.) 917; *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162. In each of these cases, the statement admitted in some way explained the accident and cause of the injury, and was, for this reason, held to be within the rule. This declaration makes no attempt to explain the accident causing the injury, and hence the same reasoning would not apply.

One of the questions in the case is whether the deceased was injured while acting within the scope of his employment. Respondent contends that, this action being under the Federal employers' liability act, the statute renders such question immaterial, and that the only test is, Was the employee injured while employed by a carrier engaged in interstate commerce? The Federal act does not give a cause of action to the employee for injuries not occasioned by negligence, and no recovery can be had under this act by simply showing the in-

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jury and that at the time the injured servant was engaged in interstate commerce. The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servant with a reasonably safe place in which to perform the work it requires of him, or while he is about those places which are incident to his work, and this duty is incident to all places where the employee must necessarily be in connection with his employment. But that duty is not incident to places where a servant is not required to be, nor expected to be, in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all the authorities, and the Federal act in no wise attempts to change it. Unless the evidence in this case shows that the deceased was upon the pilot of this engine in the discharge of some duty required by the railway company, then the railway company owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted, and no authorities need be cited to sustain it. There is no evidence in this record that the deceased was required to do any act which would place him upon the pilot of the engine. All the evidence on this subject is to the contrary. So far as we can find, whatever it was that caused him to step upon the pilot, it was his own purpose not in any way connected with his work as a hostler's helper. If it was his purpose to engage in any task, so far as this record goes in so showing, he was a volunteer without appellant's direction or knowledge, and so far as the law is concerned, the result is the same. If we could find anything in the evidence which would justify a different conclusion, however meager it might be, we would submit to the verdict as determinative of the fact. But we cannot find it, and such being the case, however unfortunate or distressing the circumstances may be, it is our duty to so hold.

The lower court should have sustained appellant's challenge to the sufficiency of the evidence and given judgment in its favor. The judgment is reversed, and the cause remanded with instructions to enter judgment in favor of appellant.

CROW, C. J., MOUNT, and PARKER, JJ., concur.

[No. 12127. Department Two. July 30, 1914.]

In re RAINIER AVENUE.¹

EMINENT DOMAIN—PROCEEDINGS—APPEAL—SUPERSEDEAS. The supreme court has jurisdiction to grant a supersedeas pending an appeal from a judgment in condemnation proceedings, and Rem. & Bal. Code, § 7783, providing that no appeal from a judgment entered upon an award from a jury shall delay proceedings under an ordinance directing a public improvement, is not applicable thereto, where the award was only for the user by the public of the company's right of way for street purposes, and made no provision for the expense of readjusting its tracks to conform to the surface of the street after it has been brought to the grades established by the ordinance authorizing the improvement, and moreover it was questionable whether the city had the power to condemn land for a street longitudinally over land owned by the company in fee and occupied by its tracks; since it appears that, should the questions raised by the appeal prove meritorious, the constitutional rights of the appellant will be violated if the supersedeas is not granted.

Application filed in the supreme court June 23, 1914, for a writ of supersedeas, pending an appeal from the superior court for King county, Humphries, J., entered January 27, 1914, upon the verdict of a jury, in condemnation proceedings. Granted.

Scott Calhoun and *John A. Homer*, for appellants Seattle, Renton & Southern Railway Company.

James E. Bradford and *Howard M. Findley*, for respondent City of Seattle.

¹Reported in 141 Pac. 1137.

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Opinion Per FULLERTON, J.

FULLERTON, J.—This is an application made to this court for a writ of supersedeas. The record discloses that the city of Seattle, pursuant to an ordinance duly enacted providing for the improvement of Rainier avenue, instituted a condemnation proceeding to acquire the necessary rights and property for that purpose. The improvement sought to be made extended over the avenue for some eight miles, and affected some twelve hundred distinct parcels of property, and some three thousand five hundred persons, among which was the Seattle, Renton & Southern Railway Company, and certain rights and properties owned by it. This company, in addition to owning specific real property affected by the contemplated improvement, owned and operated a railway system, the railway tracks of which extended along the avenue for practically the entire distance of the improvement. For a part of the distance over which the tracks were laid, it owned the fee in the land, and for other parts an easement only. The improvement as directed by the city ordinance provided for a change in the grade of the street which will require a readjustment of the railway company's tracks throughout the entire distance. In the condemnation suit, the city took no judgments at all against the company for some three-fourths of the way, and in the remainder took judgments and awarded damages only for a right of joint user in the street; that is to say, the right to use the street as a public highway jointly with the right of the railway company to use it in the operation of its railway. The railway company appealed from the judgment of condemnation, and the judgment entered on the award of the jury, and subsequent thereto the city paid the amount of the awards into court, and now claims the right to proceed with the improvement notwithstanding the appeal. The supersedeas is asked that action on the part of the city may be stayed pending a hearing of the appeal in this court.

The city contends that, under § 7783 of Rem. & Bal. Code (P. C. 171 § 61), this court is without jurisdiction to grant a supersedeas. That section does provide that no appeal

from any judgment entered upon the award of a jury shall delay proceedings under an ordinance directing a public improvement if the city shall pay into court for the owners and parties interested, as directed by the court, the amount of the judgment and costs, and that such city, after making such payment into court, shall be allowed to enter upon the property condemned and proceed with the improvement, becoming liable to such owner for the payment of such further compensation which may at any time be finally awarded to such owner. This statute undoubtedly has force in a case where specific property has been condemned, and no contest remains further than a contest over the amount of the award. But seemingly there are other and graver questions presented by this appeal, questions which go to the right of the city to enter upon or disturb the appellant's property. As we have said, the award was made only for the user by the public of the appellant's right of way as a highway, and this for a part of the distance only, and no award was made for the expense the company will be put to in readjusting its tracks to make them conform to the surface of the street after it has been brought to the grades established by the ordinance authorizing the improvement. Moreover, the condemnation is sought to be had for the purpose of laying a street longitudinally over land owned by the railway company in fee and occupied by it for its tracks and roadbed, and it is questioned whether authority granted to cities to lay out and improve streets is sufficiently broad to enable it to exercise such a power. It is plain, therefore, that, if it be the rule that the railway company has property in a way over which it has only an easement which cannot be taken without compensation, or if it is entitled to have ascertained and paid into court for its use the costs and damages it will suffer in making the change in its existing tracks which the improvement will require, or if it be found that the statute does not authorize a longitudinal condemnation of a railway right of way, to permit the

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city to enter upon the appellant's property at the present stage of the proceedings will be to permit it to take and damage such property without first making compensation therefor, contrary to the positive prohibition of the constitution of the state.

The merits of the controversy are not now before us, and it will be understood that we express no opinion on the merits of the question suggested. They are mentioned for the purpose of showing that the controversy is real, and that, if they be found meritorious, a constitutional right of the appellant will be violated if the supersedeas is not granted.

Our conclusion is that the operation of the judgment should be suspended during the pendency of the appeal, and to that end a supersedeas order will be entered on the filing of a bond by the appellant in the sum of \$10,000, conditioned for the payment of such damages as the city of Seattle may suffer by reason of the appeal should the cause be affirmed. The bond will be filed with the clerk of the superior court from which the appeal is taken, to be approved by the judge thereof.

Crow, C. J., MOUNT, MORRIS, and PARKER, JJ., concur.

[No. 12162. Department Two. July 30, 1914.]

THE STATE OF WASHINGTON, *on the Relation of Fred J. Chamberlain et al., Plaintiff, v. I. M. HOWELL, as Secretary of State, Defendant.*¹

STATUTES—CONSTRUCTION—ENROLLED BILL. In case of a conflict between the printed laws and an enrolled bill on file in the office of the secretary of state, the latter controls.

STATUTES—INITIATIVE MEASURES—PUBLICITY—COST OF PRINTING ARGUMENTS—STATUTES—CONSTRUCTION. Upon proposing an initiative measure to be submitted to the people, the persons filing with the secretary of state an argument in support of the same to be printed in the state pamphlet, must, on demand by the secretary of state, deposit sufficient money to cover the increased cost of "paper for, and the printing and binding of, such argument," under 3 Rem. & Bal. Code, § 4971-26, expressly so providing, and Id., § 4971-27 providing that the cost of printing the pamphlets shall be paid from the money appropriated for printing for the secretary of state, provided: that the increased cost for such arguments shall be paid from the moneys deposited to cover the same, the balance thereof to be returned to the depositors.

SAME—COST OF PRINTING ARGUMENTS—STATUTES—CONSTITUTIONALITY. 3 Rem. & Bal. Code, §§ 4971-26, 4971-27, are not invalid for the reason that they require the persons filing arguments for or against initiative measures to deposit sufficient money with the secretary of state to cover the cost of paper for, and the printing and binding of, such argument; since the requirement is not an unreasonable one, and Const., art. 2, § 1, directing the legislature to provide methods of publicity of all laws and amendments to the constitution referred to the people with arguments for and against the same, does not prohibit the legislature from requiring a fee in such case.

FULLERTON, J., dissents.

Application filed in the supreme court July 14, 1914, for a writ of mandamus to compel the secretary of state to file and print an argument upon an initiative measure. Denied.

Govnor Teats, for relators.

The Attorney General and *Scott Z. Henderson*, Assistant, for defendant.

¹Reported in 142 Pac. 1.

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Opinion Per MOUNT, J.

MOUNT, J.—This is a proceeding by mandamus to compel the secretary of state to accept for filing and print the argument in favor of what is known as "Initiative Measure No. 6."

The relators contend that they are entitled to have the secretary of state file, print, and distribute, at the expense of the state, the argument presented in favor of this initiative measure.

The petition recites that the relators have presented to the secretary of state an argument, and have tendered the sum of \$31.50 as a sufficient amount to cover the increased cost of paper for the printing and binding of the argument; and that the secretary of state has refused to receive that sum and file the argument, but insists on \$200 per page for said argument, to be paid by the proponents of the measure. No question is made upon the facts recited in the petition for the writ.

The initiative measure has been filed with the secretary of state. The secretary of state insists that he is entitled to demand, of the proponents of the bill who offer an argument in support thereof, a sufficient amount of money to cover the cost of the paper, printing, and the binding of such argument in pamphlet form. This is the sole question presented.

The constitution under which this initiative measure was filed provides at § 1, article 2, as follows:

"The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls, any act, item, section, or part of any bill, act or law passed by the legislature.

"(a) Initiative: The first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure as proposed. Initiative petitions shall be filed with the secretary of state not less than

four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. . . . All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

"The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter of the state shall receive the publication at least fifty days before the election at which they are to be voted upon."

Pursuant to these provisions, the legislature of 1913 passed an act to facilitate the operations of the provisions of that section, and to prevent fraud, and providing penalties for a violation thereof. Section 26 of this act, found on page 431, Laws of 1913 (3 Rem. & Bal. Code, § 4971-26), provides, that the person filing any initiative petition proposing a measure, shall have the right, at the time of filing such petition, or within ten days after such petition has been accepted and filed, to file with the secretary of state for printing and distribution, arguments advocating the proposed measure; and that any person may, within 20 days, file an argument in opposition to such measure; provided, that no more than two separate arguments advocating such measure, and not more than three separate arguments in opposition thereto, shall be printed and distributed at the expense of the state. The section then provides a method of selecting arguments in case more arguments are filed with the secretary of state than above stated. It also provides that each argument, either for or against the measure, shall not exceed two pages of the pamphlet required to be published by the state, and then provides as follows:

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"The person or organization filing such argument shall at the time of filing the same deposit with the secretary of state sufficient money, the amount to be estimated by the secretary of state, to cover the increased cost of paper for *and* the printing and binding of such argument."

In the law, as printed on page 432, the word "and," underscored in the foregoing quotation, is omitted. This word is in the enrolled bill on file in the office of the secretary of state, and is therefore the law. *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

Section 27 (*Id.*, § 4971-27), of the same act provides for the publication of the pamphlet by the secretary of state, and what it shall contain, and then provides as follows:

"The cost of printing and binding such pamphlets shall be paid from the money appropriated for printing for the secretary of state; provided, the increased cost of printing and binding such arguments shall be paid from the moneys deposited to cover the same and the balance of any such moneys, if any, and the moneys deposited for arguments not printed shall be returned to the persons depositing it respectively. Such number of pamphlets shall be printed as shall fill the requirements as to distribution hereinafter provided. . . ."

Sections 26 and 27 contain a clear statement to the effect that the person filing an argument in support of an initiative measure must deposit with the secretary of state sufficient money to cover the increased cost of paper for, and the printing and binding of such argument. These two sections are plain to the effect that it is the duty of the secretary of state to pay the cost of printing and binding the pamphlets, so far as the initiative measure itself is concerned, out of the money appropriated for printing. But the increased cost of paper and of printing and binding such arguments must be paid for by the person proposing the argument in favor of the measure. Relators apparently concede that the secretary is authorized to collect for the paper because they allege that they tendered a sum sufficient to cover this item.

thereof are paid by the proponents, otherwise they are not. As I say, this is not, in my judgment, a compliance with the constitutional provision; as that instrument not only contemplates, but declares in terms, that publicity shall be given to the arguments for and against a measure as well as to the measure itself.

I grant the proposition that the legislature may make the payment by the proponents of a measure of all or of some part of the costs of submitting it to the electors a condition precedent to its submission, and I grant, also, that it may reasonably regulate the length of the arguments and the number that may be submitted. This is necessary in the interests of the public revenues, as it is easy to see that, if an unrestrained license was given the citizens in this regard, the costs of submitting a measure might be made to exceed the possible revenues of the state. But this is not the question at issue. The question at issue is, Is it a due compliance with a constitutional provision which requires publicity to be given to an initiative measure with the arguments for and against the same, to give publicity to the measure without such arguments? I think it is not, and that the majority are in error in deciding otherwise.

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Opinion Per Curiam.

[No. 12027. Department Two. June 6, 1914.]

C. R. ZENER, *Appellant*, v. HANS J. SMITH, *as City Clerk*,
Respondent.¹

Appeal from a judgment of the superior court for Chelan county, Pendergast, J., entered April 16, 1914, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. **Affirmed.**

Williams & Corbin, for appellant.

Fred Kemp and *E. L. Baker*, for respondent.

Whitney & Hughes and *Sam R. Sumner*, for intervener.

PER CURIAM.—Our decision in *Pybus v. Smith*, ante p. 65, 141 Pac. 203, is controlling of the question involved in this case. For the reasons there assigned, the judgment in this case is affirmed.

[No. 12157. Department One. July 14, 1914.]

THE STATE OF WASHINGTON, *Respondent*, v. F. S. PITNEY, *Appellant*.²

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 8, 1914, upon a plea of guilty of violating the "trading stamp act," denying a motion in arrest of judgment. **Affirmed.**

Stroock & Stroock and *Hughes, McMicken, Dovell & Ramsey*, for appellant.

John F. Murphy, *Robert H. Evans*, and *Brightman, Halverstadt & Tennant*, for respondent.

PER CURIAM.—On June 17, 1913, an information was filed in the superior court in and for King county, charging that the defendant had violated Chapter 134 of the Laws of 1913 of the state of Washington, commonly known as the "Trading Stamp Act." [Laws 1913, p. 413; 3 Rem. & Bal. Code, § 7069-1 *et seq.*] From an order sustaining defendant's demurrer and dismissing the action, the state appealed. Upon consideration of that appeal, this court reversed the judgment and remanded the cause to the superior court with directions to overrule the demurrer. *State v. Pitney*, 79 Wash. 608, 140 Pac. 918.

After remittitur, the demurrer was overruled and the defendant entered a plea of guilty. Thereafter the defendant interposed a mo-

¹Reported in 141 Pac. 205.

²Reported in 141 Pac. 883.

tion in arrest of judgment. This motion was denied and sentence was imposed. The defendant has again appealed.

By his assignments, the appellant contends that the trial court erred in overruling the demurrer to the information, in overruling his motion in arrest of judgment, and in entering judgment and imposing sentence, for the reason that ch. 134, Laws of 1913, p. 413, upon which this prosecution is predicated is in violation of §§ 3, 12, and 14 of art. 1 of the constitution of the state of Washington, and is also in violation of art. 5, art. 8, and § 1 of art. 14 of the amendments to the constitution of the United States, and is therefore void.

These questions were all determined adversely to appellant's contentions on the former appeal prosecuted by the state.

For the reasons announced in our former opinion in *State v. Pitney*, *supra*, the judgment of the trial court is now affirmed.

[No. 11476. Department One. July 22, 1914.]

HUGH FISH, *Appellant*, v. THE TOWN OF RUSTON, *Respondent*.¹

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 17, 1913, upon sustaining a demurrer to the complaint, dismissing an action on contract, tried to the court. Appeal dismissed.

Walter M. Harvey (*G. C. Israel* and *H. B. Noland*, of counsel), for appellant.

Anthony M. Arntson, for respondent.

PER CURIAM.—This action was commenced by Hugh Fish against the Town of Ruston, a municipal corporation, to recover for services alleged to have been performed under a written contract and also for damages alleged to have been sustained by plaintiff by reason of false and fraudulent representations of defendant's agents. From an order dismissing the action, plaintiff has appealed.

Respondent has moved this court to dismiss the appeal for the reason that no abstract of the record has been served or filed by appellant.

The appeal was taken after June 12, 1913, and the record fails to show that any abstract has been served or filed in compliance with the requirements of chapter 116, Laws of 1913, p. 349, § 1 (3 Rem. & Bal. Code, § 1730-1). Under the authority of our recent holding in *Ollar-Robinson Co. v. O'Neill*, *ante* p. 1, 141 Pac. 194, the appeal will have to be dismissed. It is so ordered.

¹Reported in 141 Pac. 1037.

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1. **ANIMALS—VICIOUS ANIMALS—DAMAGES—LIABILITY.** The owner of a vicious bull who knows of its vicious propensity is liable for any injury it may inflict, regardless of the owner's negligence. *Gunderson v. Bieren*..... 459
2. **SAME—VICIOUS ANIMALS—INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** A stock buyer, attempting to drive a bull from a corral, is not guilty of contributory negligence, as a matter of law, in striking the bull with a whip and setting his dog upon him, where there was evidence that he was riding a first-class saddle horse, and was charged so suddenly that he could not get out of the way, and that the owner of the bull had assured him that the bull was "not mean." *Gunderson v. Bieren*..... 459

ANNULMENT:

Of marriage, see **MARRIAGE**.

ANSWER:

In pleading, see **PLEADING**, 2, 3, 5.

APPEAL AND ERROR:

Remedy by appeal as ground for denying certiorari, see **CERTIORARI**.

Costs on appeal, see **COSTS**.

Review in criminal prosecutions, see **CRIMINAL LAW**, 3, 9-14.

Condemnation proceedings, see **EMINENT DOMAIN**, 11.

From allowances to guardian on final settlement, see **GUARDIAN AND WARD**.

Review of findings as to necessary traveling expenses of guardian, see **INSANE PERSONS**, 3.

Prohibition to prevent issuance of execution pending appeal, see **PROHIBITION**.

Assessment of taxes, see **TAXATION**, 2, 6.

Harmless error in comment on facts by judge, see **TRIAL**, 1.

III. DECISIONS REVIEWABLE.

1. **APPEAL—DECISIONS APPEALABLE—GRANTING NEW TRIAL.** An order vacating a judgment against minors for fraud in procuring it, and allowing the guardian to substitute his complaint for the original

APPEAL AND ERROR—CONTINUED.

complaint in the action, and providing for further proceedings there-in according to law, is appealable as an order affecting a substantial right which grants a new trial, within Rem. & Bal. Code, § 1716, subd. 6. *Burke v. Northern Pac. R. Co.*..... 188

2. **APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY.** An appeal from the dismissal of an action to restrain the county commissioners from re-letting a contract for highway construction, and from interfering with the plaintiff in the performance of a contract let to it for the same work, will be dismissed on account of cessation of the controversy, where, pending the appeal, it is made to appear by uncontroverted affidavits that the contract has already been re-let to another, who is performing and had approximately completed the work. *Barber Asphalt Paving Co. v. Hamilton*..... 51

V. PRESERVATION AND RESERVATION IN LOWER COURT.

3. **APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS BELOW.** In the absence of a motion to retax the costs below or to strike the cost bill, error cannot be urged in taxing the costs. *Simpson Logging Co. v. Chehalis County*..... 245
4. **APPEAL—PRESERVATION OF GROUNDS—FINDINGS—EXCEPTIONS.** In the absence of exceptions to the findings of fact, they are conclusive on appeal. *Metcalf v. Storey*..... 119
5. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS.** One general exception to several separately stated findings is insufficient to obtain a review of the evidence, and only presents the question whether the findings support the judgment. *Granite Falls State Bank v. Ryan*..... 243
6. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS.** In the absence of exceptions to the findings, the evidence cannot be reviewed, and the judgment must be affirmed if the findings support the judgment. *Campion v. Kehoe*..... 627

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

7. **APPEAL—PROCEEDINGS TO PERFECT—FILING FEE—FAILURE TO PAY—DISMISSAL.** The payment of the filing fee on appeal subsequent to a motion to dismiss on the ground of nonpayment, but prior to the hearing of the motion, cures the defect, under Rem. & Bal. Code, § 1734, providing that, when any such motion does not go to the substance of the appeal, or to the right of appeal, the court may, in its discretion, deny the motion on such terms as may be just. *State v. Miller* 487
8. **APPEAL AND ERROR—NOTICE—EFFECT OF SECOND NOTICE.** The filing of a notice of appeal within due time operates as an abandonment of a prior notice, and hence all subsequent proceedings based

APPEAL AND ERROR—CONTINUED.

upon such notice are fixed as to time of filing by the date of the second notice. *State v. Miller*..... 487

X. RECORD.

9. **APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS.** Affidavits used upon a hearing must be brought up on appeal by bill of exceptions or statement of facts, and it is not enough to include them in the clerk's transcript and refer to them in the statement of facts as "hereby made a part hereof," in view of Rem. & Bal. Code, § 390, requiring them to be appropriately referred to in, and attached to, the statement of facts certified to by the judge. *Thurman v. Kildall* 283
10. **APPEAL—RECORD—AFFIDAVITS.** In the absence from the record of affidavits used against an application to dismiss an action for want of diligence in prosecution, the supreme court cannot say there was an abuse of discretion in overruling the motion. *Gibbens v. Nipp* 332
11. **APPEAL—RECORD—ABSTRACTS—NECESSITY.** The provision of 3 Rem. & Bal. Code, § 1730-1, requiring the appellant, at or before the time when he is required by rule or statute to serve his opening brief, to cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he deems necessary to the hearing, is a mandatory step in the appeal; and if the abstract is not served within the time limited, the appeal must be dismissed. *Ollar-Robinson Co. v. O'Neill*..... 1
12. **APPEAL AND ERROR—RECORD—ABSTRACT OF EVIDENCE—NECESSITY.** 3 Rem. & Bal. Code, § 1730-1, requiring the appellant to file an abstract of the record applies both to actions at law and in equity, and notwithstanding appellant's only assignment of error was the refusal of a nonsuit requiring an examination of all the evidence by the appellate court. *Caldwell v. Klyce*..... 469

XI. BRIEFS.

13. **APPEAL—BRIEFS—ASSIGNMENT OF ERRORS.** It is discretionary to allow errors to be assigned in a supplemental brief which were not mentioned in the principal brief on appeal. *State v. Paysse*.... 603

XVI. REVIEW.

14. **APPEAL—REVIEW—QUESTIONS NOT PRESENTED BELOW—PLEADINGS.** In an action of replevin, it is immaterial that the complaint failed to allege that the *res* was in the county where the action was brought, where it appeared that all the parties resided, and inferentially that all the transactions took place, in that county, and one of the defendants admitted possession, and there was no evidence that the *res* was not at all times in the county. *Armour v. Seizas* 181
15. **APPEAL—REVIEW—DISCRETION—NEW TRIAL.** Where the trial court exercised its discretion in refusing a new trial on conflicting evidence, error cannot be assigned because it appears that the trial

APPEAL AND ERROR—CONTINUED.

- judge's opinion of the evidence differed from the opinion of the jury, in the absence of any abuse of discretion. *Franey v. Seattle Taxicab Co.* 396
16. APPEAL—REVIEW—DISCRETION—NEW TRIAL. Under Rem. & Bal. Code, § 399, authorizing a new trial when the damages are "excessive or inadequate," the grant of a new trial because of inadequate damages will not be reviewed except for abuse of discretion. *Bernard v. North Yakima.* 472
17. APPEAL—REVIEW—VERDICT. A verdict supported by conflicting evidence is conclusive on appeal. *Switzer v. Sherwood.* 19
18. APPEAL—REVIEW—HARMLESS ERROR. Refusal to require answers to special interrogatories is harmless, where full and substantially accurate findings were made below, and the case is before the supreme court upon the findings made. *Brooke v. Boyd.* 213
19. APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to require an election between inconsistent theories in the complaint is not prejudicial, where the plaintiffs did in fact proceed upon one theory only, and the case was tried and evidence introduced upon that theory, which was well understood by both parties throughout the trial, and no surprise was claimed. *Fiske v. Elston.* 625
20. APPEAL—HARMLESS ERROR—PLEADINGS—AMENDMENTS. Error in ruling on the sufficiency of the complaint is harmless where there was a full trial on the merits, as the complaint will be deemed amended to conform to the proof. *Switzer v. Sherwood.* 19
21. APPEAL—REVIEW—HARMLESS ERROR—AMENDMENTS. Upon a trial *de novo* of a cause tried on the merits to the court, the supreme court will consider all proper amendments to the pleadings as made. *Lipscomb v. Exchange National Bank of Spokane.* 296
22. SAME—REVIEW—HARMLESS ERROR—EVIDENCE. Upon a trial *de novo*, the supreme court will consider the cause as if improper evidence had been excluded below, the admission of which is therefore harmless. *Lipscomb v. Exchange National Bank of Spokane.* ... 296
23. APPEAL—HARMLESS ERROR—EVIDENCE. The erroneous admission of evidence is harmless where the result of the cause would be unchanged were the evidence excluded. *Doyle v. Langdon.* 175
24. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Upon an issue as to fraud by making false representations, instructions as a whole are not prejudicially erroneous, where the jury were told plaintiff could not recover (1) if she knowingly made false representations, or (2) if she knew her representations were false when she made them, or (3) if she made them recklessly, or (4) if she made false representations without any knowledge of their truth; especially where the issue was sharply defined as to whether she made any representations whatever, and the jury determined such issue in her favor. *Agnew v. Hackett.* 236

APPEARANCE:

Authority of attorney to make, see **JUDGMENT**, 5.

APPLICATION:

Of statute requiring permit to burn forest material, see **NEGLIGENCE**, 1.

APPORTIONMENT:

Of award in condemnation proceeding, rights of lessees not of record, see **EMINENT DOMAIN**, 12.

ARCHITECTS:

Lien for services, see **MECHANICS' LIENS**, 1.

ARGUMENT:

Cost of printing arguments for or against initiative measures, see **STATUTES**, 5, 6.

ARGUMENT OF COUNSEL:

Ground for new trial, see **NEW TRIAL**, 2.

ARTICLES:

Of incorporation containing name similar to existing corporation, see **CORPORATIONS**, 1.

ASSENT:

To commission of offense, instructions, see **CRIMINAL LAW**, 1, 8.

ASSESSMENT:

Lien of, as incumbrance on property conveyed, see **COVENANTS**.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 4, 5.

Of tax, see **TAXATION**.

ASSIGNMENT OF ERRORS:

See **APPEAL AND ERROR**, 13.

ASSOCIATIONS:

Validity of appropriation of funds by commissioners in aid of county agricultural association, see **COUNTIES**.

1. **ASSOCIATIONS — CONTRACTS — LIABILITY OF MEMBERS — ACTIONS — PLEADING—DEFENSES.** The fact that the local members of a fraternity entered into a lease executed by the president and secretary in the name of the association, does not preclude the landlord, in suing for rent, from alleging that the members were a voluntary association and contracted as copartners; and it would be no defense to the action that there was a duly organized corporation in another state of the same name assumed by the tenants in the lease. *Korstad v. Williams* 452

ASSUMED NAMES:

In conduct of business, see NAMES.

ASSUMPTION:

Of risk by bailor on loss of goods, see BAILMENT, 4.

Of facts in charge to jury, see TRIAL, 3.

ATTORNEY AND CLIENT:

Allowing special counsel to aid prosecuting attorney in criminal trial, see CRIMINAL LAW, 5.

Employment of special counsel by guardian in proceedings for settlement of account, see INSANE PERSONS, 2.

Authority to make appearance, see JUDGMENT, 5.

Conduct of counsel ground for new trial, see NEW TRIAL, 2, 3.

Privileged communications, see WITNESSES, 2.

AUTHORITY:

Of commissioners to employ engineer as expert in preparing assessment roll for waterway district, see CANALS.

For abandonment of public duty by carrier, see CARRIERS, 2.

Of factor, see FACTORS.

Appearance by attorney as authorized by acquiescence, see JUDGMENT, 5.

Of justice of the peace, see JUSTICES OF THE PEACE, 2-4.

Of city to supply inhabitants with electric light, see MUNICIPAL CORPORATIONS, 15.

Of city to enact ordinance for Sunday closing of theaters, see SUNDAY.

AUTOMOBILES:

Liability of wife's separate estate for negligence of child in operating automobile, see HUSBAND AND WIFE, 1.

Liability of community for negligence of child in operation of, see MASTER AND SERVANT, 17.

Injury from collision with in city street, see MUNICIPAL CORPORATIONS, 8-10, 12, 13.

AWARD:

By jury for land taken and damaged, see EMINENT DOMAIN, 9, 10, 12.

By Industrial Insurance Commission, see MASTER AND SERVANT, 8, 9.

BAILMENT:

1. BAILMENT—LOSS OF GOODS—LIABILITY OF BAILEE. Where goods are placed on exhibition in defendant's museum at defendant's request, and the evidence fails to show that they were placed there under a contract amounting to a warranty for their return, the

BAILMENT—CONTINUED.

- transaction is a bailment for the mutual benefit of both parties, hence the defendant is bound to exercise ordinary diligence only, and is liable accordingly in the event of loss or damage to the goods. *Colburn v. Washington State Art Association*..... 662
2. **SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** In such case, the evidence is insufficient to show negligence of the bailee in guarding against loss of the goods by theft, where the articles exhibited were placed in the museum for the mutual benefit of the parties, the plaintiff himself directing and assisting in arranging the exhibit, and, upon objecting to the manner of securing the show case in which the articles were placed, finally consented to the use of wire fastenings instead of a padlock, being told that the method employed was equally as safe and that a watchman was employed, and it was further shown that the plaintiff visited the museum and saw his goods several times prior to the theft, and that he was free to remove them at any time he desired. *Colburn v. Washington State Art Association* 662
3. **BAILMENT—LOSS OF GOODS—NEGLIGENCE—BURDEN OF PROOF.** In an action to recover for loss of articles placed in defendant's care for exhibition purposes, there is a presumption of negligence from their loss, but where the bailee shows the loss to have resulted by theft of third parties, he thereby meets the *prima facie* case against him for failure or refusal to deliver the articles, and the burden of proof as to his negligence then rests upon the plaintiff. *Colburn v. Washington State Art Association*..... 662
4. **SAME—NEGLIGENCE—ASSUMPTION OF RISK.** The plaintiff cannot recover from a bailee for the loss of goods by theft, on the ground that permission was denied him to put a padlock on the case in which the goods were kept, where it was shown that he voluntarily placed and left them there for exhibition, and knew the manner in which the case was fastened, thereby assuming the risk in that respect. *Colburn v. Washington State Art Association*..... 662

BANKS AND BANKING:

1. **BANKS AND BANKING—DEPOSITS—SPECIAL DEPOSITS—CONDITION—LIABILITY.** Where a loan was negotiated with the understanding that the money, when deposited in the bank, was to be used only in payment of specified bills of the mortgagor and of bills against the building on the mortgaged premises, and the bank notified the mortgagor of the special features of the deposit, which was acquiesced in after some dissent, the deposit was a special one and the bank was justified in refusing to honor checks not drawn in payment of bills against the building. *Stephens v. Chehalis National Bank* 254

BAR:

Of action by former adjudication, see JUDGMENT, 2-4.

BENEFITS:

To property from improvement, see **MUNICIPAL CORPORATIONS**, 5.
Acceptance of, as ground of ratification, see **PRINCIPAL AND AGENT**.

BEQUESTS:

See **WILLS**.

BILL OF EXCEPTIONS:

As part of record on appeal, see **APPEAL AND ERROR**, 9.

BILL OF LADING:

See **CARRIERS**, 7.

BILL OF PARTICULARS:

See **PLEADING**, 1.

BILLS AND NOTES:

Contribution for note paid, see **CONTRIBUTION**.
Fraud inducing execution of note, see **FRAUD**, 1.

1. **BILLS AND NOTES—HOLDER IN DUE COURSE—EVIDENCE—SUFFICIENCY.** That plaintiff was the holder of notes in due course is established without substantial dispute, where her testimony was that she paid full value, on purchasing the notes as an investment, upon recommendation of a third party and knowledge of the financial standing of the maker, the only evidence of prior notice being a brief indefinite conversation with a stranger of a general nature without reference to the notes, before plaintiff contemplated purchasing them. *Gibbens v. Nipp*..... 332
2. **BILLS AND NOTES—BONA FIDE PURCHASER—NOTICE.** Creditors of a trust estate who were beneficiaries of the trust, are not *bona fide* purchasers of a note, sold to them by the trustee, with outstanding equities against it, where they participated in the trust, knew its purposes and conditions, and knew of the terms and conditions creating the outstanding equities in favor of the makers; hence they stand in the position of the trustee as to such equities in favor of the makers. *Barker v. Pfund*..... 143

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see **BILLS AND NOTES**.
Of lands, see **VENDOR AND PURCHASER**, 3, 4.

BONDS:

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 14, 16.
To abate nuisance under "Red Light Law," see **NUISANCE**, 2.

BREACH:

Of covenant, see **COVENANTS**.
Of warranty, see **SALES**, 7.

BRIEFS:

On appeal, see **APPEAL AND ERROR**, 13.

BROKERS:

See **FACTORS**.

Termination of brokerage contract by subsequent incorporation of party, see **CORPORATIONS**, 3.

Agreement for handling importing business and for division of profits, see **JOINT ADVENTURES**.

1. **BROKERS—ACTIONS FOR COMMISSIONS—DEFENSES—FAILURE TO PERFORM.** There is no liability for a broker's commissions, agreed to be paid upon the completion of a certain trade, where it was conclusively established that the trade was not completed. *Metcalf v. Storey* 119

BURDEN OF PROOF:

As to negligence of bailee in care of goods, see **BAILMENT**, 3.

To show want of authority in attorney to make appearance, see **JUDGMENT**, 6.

BURGLARY:

Loss of goods by theft, see **BAILMENT**.

CANALS:

1. **CANALS — WATERWAY DISTRICTS — ESTABLISHMENT—CONTRACTS — POWER OF COMMISSIONERS.** Under 3 Rem. & Bal. Code, §§ 8166a and 8177a, authorizing the commissioners of a waterway district to employ engineers to assist them in compiling data required to be presented to the court in the petition for the formation of the district, and such legal and other assistance as may be necessary, the commissioners have no power to enter into a contract to employ an engineer as an expert adviser for the purpose of preparing the assessment roll, at \$300 per month, the employment to continue until the roll had been finally settled by the supreme court; since after the work was completed and before termination of the employment, a considerable period of time must elapse during which no service could be rendered. *Merrifield v. Commercial Waterway District No. 1* 279

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see **SALES**, 3; **VENDOR AND PURCHASER**, 1, 2.

CARRIERS:

1. **CARRIERS—PUBLIC DUTIES—ABANDONMENT OF LINE.** A common carrier having exercised the privileges conferred under a permissive franchise, neither it nor its successor in interest, can, against the will of the state, abandon the enterprise if it works a prejudice to the public interest. *Day v. Tacoma R. & Power Co.* 161

CARRIERS—CONTINUED.

2. CARRIERS—PUBLIC DUTIES—ABANDONMENT—AUTHORITY FOR—POWER OF COUNTY COMMISSIONERS. Rem. & Bal. Code, § 9080, empowering county commissioners to grant franchises for railway systems upon public roads outside the limits of incorporated cities and towns and to prescribe the terms and conditions on which they may be enjoyed, does not expressly or by implication confer power upon the commissioners to consent to an abandonment of any public duty imposed upon or assumed by common carriers. *Day v. Tacoma R. & Power Co.* 161
3. SAME—ACTION TO ENJOIN ABANDONMENT OF LINE—PARTIES ENTITLED—PRIVATE INTERESTS—COMPLAINT—SUFFICIENCY. Individuals, living along the line of a street railway, cannot maintain an action to prevent the company from abandoning the route merely because they, "and many other residents similarly situated," are dependent on the line for railway service, in the absence of any allegation as to the number of persons affected who are too remote to use a new parallel route, or the manner in which the public convenience will be affected. *Day v. Tacoma R. & Power Co.*..... 161
4. SAME—ABANDONMENT OF LINE—PUBLIC INTEREST—COMPETITIVE SERVICE. Injunction does not lie to prevent a street railway company from abandoning that part of its road lying between two stations served by a competing road lying closely parallel, merely because the abandonment necessarily results in depriving all persons to whom both roads are accessible of competitive service; since the whole theory of the public service law (3 Rem. & Bal. Code, § 8626-1 *et seq.*), is opposed to the idea that the public will be better served with two closely parallel lines of road where one road will amply suffice. *Day v. Tacoma R. & Power Co.*..... 161
5. CARRIERS—EXPRESS COMPANIES—DUTIES—RENUNCIATION OF INTRA-STATE BUSINESS—POWER. The state having no power to place a burden upon interstate commerce, an interstate express company doing business in this state is free to renounce its intrastate business, notwithstanding the constitutional and statutory provisions making express companies common carriers subject to state control, and prohibiting discrimination in privileges and transportation charges (overruling on rehearing *Id.*, 76 Wash. 636). *State v. Northern Express Co.*..... 309
6. CARRIERS—RATES—REGULATION—ORDER OF PUBLIC SERVICE COMMISSION—WHEN TO TAKE EFFECT. Under 3 Rem. & Bal. Code, § 8626-81, providing that at the conclusion of a rate hearing before the public service commission, the commission should enter an order which shall of its own force take effect and become operative twenty days after service thereof, unless additional time is prescribed by the commission, an order of the commission fixing reasonable rates after a hearing, without fixing any time for it to become effective, takes effect and becomes operative twenty days after the service

CARRIERS—CONTINUED.

- thereof. *State ex rel. Great Northern R. Co. v. Public Service Commission* 218
7. CARRIERS—OF GOODS—WRONGFUL DELIVERY—BILL OF LADING—LIABILITY OF CARRIER. An interstate carrier is liable for consigned goods delivered to the consignee and lost to the consignor, where, before delivery, the consignor notified the carrier of the consignee's refusal to accept the goods, surrendered the bill of lading to the carrier, and directed a return of the goods, both at common law, and under 34 Stat. at L., p. 595, providing that, in receiving property for interstate transportation, carriers shall issue a bill of lading and shall be liable to the lawful holder thereof for any loss, damage, or injury to the property caused by it or by connecting carriers over whose lines the property passes. *Coover v. Spokane, Portland & Seattle R. Co.*..... 87
8. SAME—WRONGFUL DELIVERY—ACT OF CONNECTING CARRIER—LIABILITY. In such a case, the initial carrier's duty does not end by merely carrying the goods to their destination safely, but it must make delivery to the persons entitled to receive them or store them subject to the consignor's orders; hence it cannot avoid liability under the above Federal act by the fact that a connecting carrier made the delivery. *Coover v. Spokane, Portland & Seattle R. Co.*..... 87
9. CARRIERS—PASSENGERS—FREE PASSES—EMPLOYEES—CONTRACT RIGHTS. An employee riding on a free pass given as part of the consideration for her services, is a passenger for hire, and a clause exempting the carrier from liability for negligence is void as against public policy; while it would not be so if the pass were a pure gratuity. *Hageman v. Puget Sound Electric R.*..... 442
10. SAME—FREE PASSES—WAIVER OF CONTRACT RIGHTS. An employee contracting for a free pass whenever desired, as part of the consideration for her services, whereby she would become a passenger for hire, may waive her contract rights, and does so, where, after the employment, her written application therefor and the pass both stipulated that the pass was a pure gratuity without any consideration. *Hageman v. Puget Sound Electric R.*..... 442
11. CARRIERS—INJURIES TO PASSENGERS—TAKING ON DISABLED PASSENGERS—SUDDEN STOPS—PROXIMATE CAUSE. Where a street car was started before a passenger, walking with crutches, had time to get a seat, and he was thrown to the floor by an emergency stop which was necessary to avoid injury to a person on the crossing, the starting of the car before the passenger was seated was the proximate cause of his injury. *Rice v. Puget Sound Traction, Light & Power Co.* 47
12. SAME—TAKING ON DISABLED PASSENGERS—SUDDEN STOPS—NEGLECT—QUESTION FOR JURY. The negligence of a street railway company in starting a car before a passenger, walking with crutches,

CARRIERS—CONTINUED.

could take a seat, is for the jury, where he was thrown to the floor by an emergency stop to avoid injury to a person on a crowded city crossing. *Rice v. Puget Sound Traction, Light & Power Co.*..... 47

CAUSA MORTIS:

See GIFTS.

CAVEAT EMPTOR:

Sales of trust estate, see TRUSTS.

CERTAINTY:

Of information charging violation of local option law, see INTOXICATING LIQUORS, 1.

Of complaint, see PLEADING, 1.

CERTIFICATE:

Of abstracter, see ABSTRACTS OF TITLE.

As to assumed name in conducting business, see NAMES.

CERTIORARI:

1. CERTIORARI—WHEN LIES—ADEQUATE REMEDY BY APPEAL. Certiorari does not lie when there is an adequate remedy by appeal. *State ex rel. Northern Pac. R. Co. v. Superior Court*..... 190

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 2.

CHANGE OF VENUE:

In justices' courts, see JUSTICES OF THE PEACE, 4.

CHARACTER:

Previous chaste character of female, see SEDUCTION, 1.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 1, 8, 13.

To jury in civil actions, see TRIAL.

CHASTITY:

Of female, see SEDUCTION, 1, 3.

CHILD:

See GUARDIAN AND WARD.

Custody of, on divorce of parents, see DIVORCE, 5, 6.

Recovery under Industrial Insurance Act for death of minor employee, see MASTER AND SERVANT, 3-5.

Liability of community to third person for injury from negligence of daughter in driving automobile, see MASTER AND SERVANT, 17.

Places attractive to children, see NEGLIGENCE, 3, 5.

Injury from loose fender-pile on public dock, see WHARVES.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CLAIM AND DELIVERY:

See **REPLEVIN**.

CLAIMS:

Inconsistent claims, see **ESTOPPEL**, 1.

Against city, presenting, see **MUNICIPAL CORPORATIONS**, 17-21.

CLASSIFICATION:

Of premiums required by Industrial Insurance Act, see **MASTER AND SERVANT**, 7.

COLLISION:

With automobile in city street, see **MUNICIPAL CORPORATIONS**, 8-10, 12, 13.

COMMENT:

On evidence in instructions, see **TRIAL**, 1, 2.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.

1. **COMMERCE—INTERSTATE COMMERCE—REGULATION BY STATE—EXCISE TAX—VALIDITY.** Rem. & Bal. Code, §§ 9161-9168, levying an excise or privilege tax upon express companies upon the gross receipts for business done within the state of Washington, refers to business begun and ended within this state, and being a tax upon intrastate commerce only, does not impose a burden upon interstate commerce (overruling on rehearing, Id., 76 Wash. 636). *State v. Northern Express Co.* 309

COMMINGLED FUNDS:

Separate or community, nature of, see **HUSBAND AND WIFE**, 2.

COMMISSIONERS:

Power to employ engineer as expert in preparing assessment roll for waterway district, see **CANALS**.

Power of county commissioners to consent to abandonment of line, see **CARRIERS**, 2.

Validity of appropriation of funds by, for aid of county agricultural association, see **COUNTIES**.

Award by Industrial Insurance Commission for injuries to employee, see **MASTER AND SERVANT**, 8, 9.

COMMISSIONS:

Of broker, see **BROKERS**.

COMMON CARRIERS:

See CARRIERS.

COMMON LAW:

Common law marriages, see MARRIAGE.

1. **COMMON LAW—RULE OF DECISION.** The common law is the rule of decision in the courts of the state of Washington, except where other rules may be prescribed by the constitution and statutes, because of the source of our institutions, and as further declared by legislative enactment in Rem. & Bal. Code, § 143. *Corcoran v. Postal Telegraph-Cable Co.* 570

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 2.

COMPENSATION:

Of broker, see BROKERS.

For property taken or damaged for public use, see EMINENT DOMAIN, 9, 10, 12, 13.

Recovery under Industrial Insurance Act, see MASTER AND SERVANT, 4, 5, 8, 9.

COMPETENCY:

Of witnesses in general, see WITNESSES, 1, 4.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.

In civil actions, see PLEADING, 1-3.

CONCLUSION:

In pleading, see PLEADING, 2.

CONCLUSIVENESS:

Of orders prior to final hearing, see COURTS.

Of award in condemnation, see EMINENT DOMAIN, 9, 10, 12.

Of judgment, see JUDGMENT, 2-4.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITION:

Precedent to condemnation by city, see EMINENT DOMAIN, 5-7.

Precedent to action against city for damages, see MUNICIPAL CORPORATIONS, 17-21.

CONDITIONAL SALES:

See SALES, 8.

CONDUCT:

- Of party ground for new trial, see **NEW TRIAL**, 1.
- Of counsel as ground for new trial, see **NEW TRIAL**, 2, 3.
- Of judge in civil action, see **TRIAL**, 1.

CONSIGNMENT:

- Of goods to agent for sale on commission, see **SALES**, 8.

CONSTITUTIONAL LAW:

- Appropriation in aid of county agricultural association as loan of credit, see **COUNTIES**.
 - Regulation of practice of medicine as denial of equal protection of laws, see **PHYSICIANS AND SURGEONS**.
 - Enactment and validity of statutes, see **STATUTES**.
 - Uniformity, see **TAXATION**, 1.
1. **CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF BUSINESS.** An ordinance prohibiting the opening of theaters on Sunday is not an unreasonable exercise of the police power. *In re Ferguson*.. 102
 2. **CONSTITUTIONAL LAW—DUE PROCESS—TAX—NOTICE.** The "Red Light Law," resulting in a tax against property offending against the law, does not offend against the due process clause of the constitution, since the persons interested are served with process and have their day in court. *State ex rel. Kern v. Jerome*..... 261
 3. **CONSTITUTIONAL LAW—DUE PROCESS—USE OF CONDEMNED PROPERTY.** The condemnation of property for a railroad right of way and terminals, not presently needed or devoted to a public use, is not a taking without due process of law, where there has been no abandonment of the easement. *Neitzel v. Spokane International R. Co.* 30

CONSTRUCTION:

- Of statute relating to exemption of property, see **EXEMPTIONS**.
- Of laws relating to regulation and protection of fish, see **FISH**.
- Of local option laws, see **INTOXICATING LIQUORS**, 1.
- Of contract, see **JOINT ADVENTURES**, 3.
- Of statutes relating to malicious slander impairing chastity of female, see **LIBEL AND SLANDER**, 3, 4.
- Of laws relating to marriage, see **MARRIAGE**.
- Of Industrial Insurance Act, see **MASTER AND SERVANT**, 1, 2, 7-9.
- Of statute requiring certificate as to assumed name in conducting business, see **NAMES**.
- Of conveyance by upland owner as passing title to lands under water, see **NAVIGABLE WATERS**.
- Of statute relating to licenses for practicing medicine, see **PHYSICIANS AND SURGEONS**, 2.
- Of contract, see **SALES**.

CONSTRUCTION—CONTINUED.

- Of statutes, see **STATUTES**, 3-6.
- Of statute relating to Sunday closing of theaters, see **SUNDAY**, 4.
- Of will, see **WILLS**.
- Of statute relating to testimony of transactions with persons since deceased, see **WITNESSES**, 1.

CONTINUANCE:

- In criminal prosecution, see **CRIMINAL LAW**, 12.
- In justices' courts, see **JUSTICES OF THE PEACE**, 1.

CONTRACTORS:

- Recovery for extra work under highway contract, see **STATES**.

CONTRACTS:

- See **BAILMENT**; **BILLS AND NOTES**; **CORPORATIONS**; **COVENANTS**; **INSURANCE**, 1; **JOINT ADVENTURES**; **SALES**.
 - Liability of members of fraternity for rent under lease, see **ASSOCIATIONS**.
 - Power of commissioners to employ expert to prepare assessment roll for waterway district, see **CANALS**.
 - Carriage of goods, see **CARRIERS**, 7, 8.
 - For free pass, as part of consideration for services, see **CARRIERS**, 9, 10.
 - Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
 - Restraining performance or breach, see **INJUNCTION**.
 - Leases, see **LANDLORD AND TENANT**.
 - Employment, see **MASTER AND SERVANT**, 11.
 - By agent, see **PRINCIPAL AND AGENT**.
 - By state, see **STATES**.
 - Sales of realty, see **VENDOR AND PURCHASER**.
1. **CONTRACTS—VALIDITY—EFFECT OF VIOLATION OF STATUTE—PLEDGES.**
A contract of pledge, providing for a violation of Rem. & Bal. Code, §§ 2481-2483, providing that pawnbrokers shall keep a record of each loan and report the same to the police, does not render the contract void; since the statute was a regulation of business and did not provide that a contract violating its provisions should be void. *Lane v. Henry* 172

CONTRIBUTION:

- By stockholders, see **CORPORATIONS**, 2.
1. **CONTRIBUTION—ACTIONS—DEFENSES—CONSENT TO RELEASE.** It is no defense to an action for contribution for a note paid, that the other makers paid the note only after executing several renewal notes, which defendant refused to sign, where they did not consent to release the defendant, and the action was commenced after the last renewal was paid. *Brooke v. Boyd*..... 213

CONTRIBUTORY NEGLIGENCE:

- Of person injured by vicious bull, see **ANIMALS**, 2.
- Of person injured on street, see **MUNICIPAL CORPORATIONS**, 11-13.
- Of child injured, see **NEGLIGENCE**, 6.
- Of driver of team at railroad crossing, see **RAILROADS**, 2.

CONVERSION:

- Authority of administrator *de bonis non* to maintain action for conversion of rents and profits by former executor, see **EXECUTORS AND ADMINISTRATORS**, 1, 3.

CONVEYANCES:

- Of property as rededication, see **DEDICATION**.
- Of title to lands under water, see **NAVIGABLE WATERS**.
- In trust, see **TRUSTS**.
- Of real property, see **VENDOR AND PURCHASER**.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.

Acquisition of property by condemnation, see **EMINENT DOMAIN**, 1-7, 9, 11, 13, 14-19.

Ownership of stock of other company as violation of law, who may question, see **RAILROADS**, 1.

Water companies, discrimination in rates, see **WATERS AND WATER COURSES**.

1. **CORPORATIONS—NAME—FILING ARTICLES—DUTY OF SECRETARY OF STATE.** Where the name of a proposed corporation is so similar to that of corporations lawfully doing business in the state as to lead to possible confusion, it is the duty of the secretary of state to reject the offered articles of corporation, under Rem. & Bal. Code, § 3680, providing that no corporation shall take the name of a corporation theretofore organized, nor one so nearly resembling the name of such other corporation as to be misleading; and the proposed name "Kennewick Fruit Exchange" is so similar to the name "Kennewick District Fruit Growers' Association" as to be misleading. *State ex rel. Collins v. Howell*..... 649
2. **CORPORATIONS—STOCKHOLDERS—LIABILITY TO CONTRIBUTION.** Where five stockholders became surety for their corporation, the right of contribution arises among themselves upon a payment by part of them, each being liable for one-fifth of the amount, and not according to the amount of stock held by each. *Brooke v. Boyd*..... 213
3. **CORPORATIONS—CONTRACTS—TERMINATION—CORPORATION AS SUCCESSOR TO PARTY.** There is no termination of a contract between custom house brokers respecting the handling of an importing business and the division of fees thereunder, by the subsequent incorporation of one of the parties theretofore handling the business as an individual, where, up to the time of trial, there was no serious

CORPORATIONS—CONTINUED.

- contention that the original contract was not still in force, the parties recognized the corporation as succeeding to the interests of the individual, and the corporation continued to transact the business as previously done. *Bane v. Dow*..... 631
4. CORPORATIONS—INSOLVENCY—UNPAID STOCK SUBSCRIPTIONS—ACTIONS—RIGHTS OF CREDITOR. A single creditor of an insolvent corporation cannot maintain an action at law, for plaintiff's exclusive benefit, against a stockholder to recover on his unpaid stock subscription. *Montesano v. Carr*..... 384
5. SAME—ACTIONS—LAW OR EQUITY—PRAYER OF COMPLAINT. An action at law by one creditor of an insolvent corporation to recover the unpaid subscription of a stockholder is not to be converted into an equitable action for the benefit of all the creditors by a prayer in the complaint for such other relief as may be just and equitable, especially where the plaintiff insists upon a money judgment for its exclusive use and benefit. *Montesano v. Carr*..... 384
6. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—RIGHT TO MAINTAIN. Under N. Y. Civ. Code of Procedure, § 1780, providing that a foreign corporation may maintain an action against another for breach of a contract made within the state of New York, the courts of that state have jurisdiction of an action between foreign corporations upon a policy of insurance issued, executed and delivered in the state of New York. *Kline Brothers & Co. v. North Coast Fire Ins. Co.* 609

CORROBORATION:

- Of testimony of person slandered, see LIBEL AND SLANDER, 4.
 Of evidence in prosecution for perjury, see PERJURY, 3.
 Of testimony in prosecution for seduction, see SEDUCTION, 4, 5.

COSTS:

- Review of error in taxing costs as dependent on objections in lower court, see APPEAL AND ERROR, 3.
 Of printing arguments for or against initiative measure, see STATUTES, 5, 6.
1. COSTS—ON APPEAL. Where both parties appeal, and neither is successful in attacking the judgment, costs will not be allowed in the supreme court. *Bane v. Dow*..... 631

COUNCIL:

- See MUNICIPAL CORPORATIONS, 1, 2.

COUNCILMEN:

- Malfeasance in office ground for recall, see MUNICIPAL CORPORATIONS, 2.

COUNTIES:

Maintenance of premises attractive to children, see **NEGLIGENCE**, 3, 5.
 Liability for defect in public dock maintained at termination of county road, see **WHEARVES**.

1. **COUNTIES—FUNDS—GIFTS—AID TO AGRICULTURAL ASSOCIATIONS—CONSTITUTIONAL LAW.** Rem. & Bal. Code, § 3024 *et seq.*, providing that the county commissioners may make an appropriation to a county agricultural fair association to pay expenses and premiums awarded, violates Const., art. 8, § 7, prohibiting a county from giving any money or property or loaning its money or credit to or in aid of any individual, association or corporation except for the necessary support of the poor and infirm, etc.; and it is immaterial that § 3025 makes the county commissioners *ex officio* members of the fair association, and that § 3026 provides that all buildings and structures erected and the funds appropriated shall become the property of the county. *Johns v. Wadsworth*..... 352

COURTS:

Necessity of recognizing distinction between law and equity actions, see **ACTION**, 1.

Review of decisions, see **APPEAL AND ERROR**.

Rule of decision, see **COMMON LAW**.

Jurisdiction of action between foreign corporations, see **CORPORATIONS**, 6.

Condemnation proceedings, see **EMINENT DOMAIN**.

Entry of default judgment, see **JUDGMENT**, 1.

Justices' courts, see **JUSTICES OF THE PEACE**.

Power to grant mandamus by default, see **MANDAMUS**.

Inquiry as to motive inducing passage of ordinance, see **MUNICIPAL CORPORATIONS**, 1.

Jurisdiction of supreme court to determine sufficiency of appeal, see **PROHIBITION**.

Review of assessment of tax, see **TAXATION**, 2, 6.

1. **COURTS—POWER TO CORRECT ERROR—INTERLOCUTORY ORDERS—CONCLUSIVENESS.** Where, prior to final hearing on an appeal from a decision of the industrial insurance department, the then presiding judge awarded appellant a jury trial, and at the final hearing another judge overruled the holding of the former judge, the first ruling was not conclusive, but was an interlocutory order subject to change and correction before final disposition of the cause. *Sinnes v. Daggett* 673

COVENANTS:

1. **COVENANT—AGAINST INCUMBRANCES—MUNICIPAL CORPORATIONS—LIEN OF ASSESSMENTS—WHEN ATTACHES.** There is no breach of a covenant against incumbrances from the fact that, prior to conveyance, the city had instituted condemnation proceedings against the

COVENANTS—CONTINUED.

property conveyed for the purpose of paying the cost of widening and extending a street, under which a special assessment had been levied and confirmed by judgment of the court subsequent to the conveyance, since the lien of such assessment would not attach until the date of the judgment, under Rem. & Bal. Code, § 7797. *Flajole v. Schulze* 483

CREDITORS:

Right of creditor of insolvent corporation to maintain action against stockholder on unpaid stock subscription, see **CORPORATIONS**, 4, 5.

CRIMINAL LAW:

See **HOMICIDE**; **LARCENY**; **LIBEL AND SLANDER**; **PERJURY**; **SEDUCTION**.
Indictment, information, or complaint, see **INDICTMENT AND INFORMATION**.

Violation of liquor laws, see **INTOXICATING LIQUORS**.

Criminal trial in justice court, see **JUSTICES OF THE PEACE**.

Grant of new trial for surprise and newly discovered evidence, see **NEW TRIAL**, 6.

Practicing medicine without a license, see **PHYSICIANS AND SURGEONS**.

Taxation against property in prosecution under "Red Light Law," see **TAXATION**, 1.

Examination of witnesses, see **WITNESSES**, 2-4.

1. **CRIMINAL LAW—PRINCIPALS—AIDING AND ABETTING—WHAT CONSTITUTES—"ASSENT"—INSTRUCTIONS.** It is error to instruct that one jointly informed against for grand larceny may be convicted if the property was taken by his codefendants with his aid "or assent"; in view of Rem. & Bal. Code, § 2260, which predicates the aiding and abetting of the commission of an offense upon the overt acts of aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring the commission thereof; since mere assent to an act is a mental attitude and does not imply contribution or expressed concurrence. *State v. Peasley* 99
2. **CRIMINAL LAW—EVIDENCE—IDENTITY OF ACCUSED—SUFFICIENCY.** In a prosecution under the habitual criminal act, upon an issue as to the identity of accused and a person of the same name convicted and sentenced to the state penitentiary in New York, the evidence is sufficient where the Bertillon clerk of such prison testified that he was well acquainted with a person of the same name imprisoned in such prison at that time, and that he and the accused were one and the same person, taken in connection with photographs and handwriting; the rule being that identity of names raises a presumption of identity of persons, where there is a similarity of residence, trade, or circumstances. *State v. Miller* 75
3. **CRIMINAL LAW—DISMISSAL FOR FAILURE TO PROSECUTE—APPEAL—EXCUSE FOR DELAY—DILIGENCE.** Accused, convicted in police court and appealing to the superior court, is not entitled to a dismissal

CRIMINAL LAW—CONTINUED.

- for failure of the state to bring the case to trial within sixty days, as required by Rem. & Bal. Code, § 2312, where he made no demand upon the court itself to have the case set for trial, although he frequently requested the prosecuting attorney to move therefor and no criminal cases were set for trial except on such motion; since § 2312, has no application to appeals from convictions in justice court, in view of Id., §§ 1919 and 1920, providing that the bond on appeal shall require the defendant to appear in the superior court and prosecute the appeal, and directing default of his recognizance and sentence against him if he fails to do so; his requests to the prosecuting attorney not being reasonable diligence in the discharge of his obligation to prosecute the appeal. *State v. Jones* 335
4. SAME—TRIAL—INDORSEMENT OF WITNESS. It is not error to allow the state to indorse upon the information the name of an additional witness, where no continuance was asked. *State v. Miller*..... 75
5. SAME—TRIAL—CONDUCT—SPECIAL COUNSEL. It is discretionary to allow special counsel to aid the prosecuting attorney in a criminal trial. *State v. Miller* 75
6. CRIMINAL LAW—TRIAL—COMMENT ON EVIDENCE. In overruling an objection to the cross-examination of a witness, who testified he had taken certain liberties with the prosecuting witness prior to the seduction, which sought to bring out that he had been telling the story about town, the comment of the court that "it is simply setting out the character of the witness," while unfortunate, cannot be deemed prejudicial, as it expresses no opinion as to the character of the witness or as to weight of his testimony. *State v. Jones*.. 588
7. CRIMINAL LAW—TRIAL—REFUSAL TO REOPEN CASE. The refusal of the court to reopen the case, in a prosecution for seduction after the evidence was closed, but before the jury was instructed, for the introduction of newly discovered evidence of admissions by the prosecuting witness of unchastity prior to the alleged seduction, was such an abuse of discretion as to warrant reversal, where there was nothing to indicate sharp practice on the prisoner's behalf. *State v. Jones* 588
8. CRIMINAL LAW—TRIAL—INSTRUCTIONS. An erroneous instruction authorizing a conviction of grand larceny if the defendant "assented" to the commission of the act, is not cured by a subsequent correct instruction which also authorizes his conviction if he actively participated or contributed to the crime by his own act in aiding his confederate. *State v. Peasley* 99
9. CRIMINAL LAW—APPEAL PRESERVATION OF GROUNDS—REVIEW. Upon appeal in a criminal case, error cannot be assigned upon the introduction of evidence to which no objection was made below. *State v. Paysse* 603

CRIMINAL LAW—CONTINUED.

10. CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS — ADMISSION OF EVIDENCE. In a prosecution for seduction, the error of the court in refusing to admit questions to the prosecuting witness seeking to overthrow the presumption of her previous chastity and to affect her credibility should not be upheld merely from a hint in the record that they were excluded on account of some wrong upon the prosecuting witness, but the proper course would have been to make the offer of evidence in the absence of the jury, thus preserving a record of the motive of the court in excluding the questions so that it might be determined whether such action was justified. *State v. Jones* 588
11. SAME—RECORD—STATEMENT OF FACTS — NECESSITY. Refusal to grant a new trial on the ground of misconduct of the jury, occurring out of the presence of the court, is not reviewable in the absence of evidence embodied in the statement of facts touching upon such error. *State v. Lewis* 532
12. CRIMINAL LAW — APPEAL — REVIEW — DISCRETION — CONTINUANCE. The denial of a continuance in a criminal trial, asked because of insufficient time to prepare a defense and because of prejudice of the panel of jurors in attendance, will not be disturbed on appeal where abuse of discretion was not shown. *State v. Miller*..... 75
13. CRIMINAL LAW—APPEAL—HARMLESS ERROR — INSTRUCTIONS. Refusal of the court to give requested instructions is not prejudicial, where other instructions of the same nature and equally favorable were given by the court. *State v. Lewis*..... 532
14. CRIMINAL LAW—APPEAL—DETERMINATION — SUSTAINING DEMURRER TO INFORMATION—RIGHT TO NEW ACTION. Where a demurrer to an information charging larceny of oysters was sustained by the trial court on the concession of the prosecution that the offense consisted in the taking of oysters from their natural beds in state reserve lands at a time prohibited by statute, on appeal the judgment will be affirmed without prejudice to the commencement of a new action by the prosecuting attorney based upon the violation of the statutory offense. *State v. Johnson*..... 522
15. CRIMINAL LAW—MISDEMEANOR—PUNISHMENT—GAME—OFFENSES — UNLAWFUL HUNTING. Under 3 Rem. & Bal. Code, § 5395-23, of the game code, making it a gross misdemeanor to hunt deer with dogs, and providing that any person convicted thereof shall be punished "as hereinafter provided," without, however, making any provision in the game code for such punishment, the words "as hereinafter provided" may be treated as surplusage, and resort should be had to the general statute, 1 Rem. & Bal. Code, § 2267, providing that every person convicted of a gross misdemeanor for which no punishment is prescribed at the time of the conviction shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than \$1,000, or by both. *State v. Deer*..... 92

CRIMINAL LAW—CONTINUED.

16. **CRIMINAL LAW—STATUTORY CRIMES—PUNISHMENT.** The taking of oysters from any of the state oyster land reserves is a penal offense, under Rem. & Bal. Code, § 5253, making it a misdemeanor, and, as the statute creates a new offense, the punishment can be only that which the statute prescribes. *State v. Johnson*..... 522

CROSS-EXAMINATION:

See WITNESSES, 3.

CROSSINGS:

Accident at railroad crossing, see RAILROADS, 2.

CRUELTY:

Ground for divorce, see DIVORCE, 1.

CUSTODY:

Of child, see DIVORCE, 5, 6.

DAMAGES:

Liability of owner for injuries inflicted by vicious bull, see ANIMALS.
New trial for inadequate damages, review, see APPEAL AND ERROR, 16.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 9, 10, 12.

For removal of lateral support by city, see EMINENT DOMAIN, 13.

Liability of wife's separate estate for negligence of child in operating automobile, see HUSBAND AND WIFE, 1.

Alleging cause of action for in suit to enjoin breach of contract, see INJUNCTION.

Claims against city for, see MUNICIPAL CORPORATIONS, 17-21.

For breach of warranty, see SALES, 7.

Failure to deliver telegrams, see TELEGRAPHS AND TELEPHONES.

Inadequacy of ground for new trial, see TRIAL, 4, 5.

1. **DAMAGES—PUNITIVE—ALLOWANCE.** Punitive damages are not recoverable in this state, even when the injury upon which the claim is rested flows from gross negligence or wilful wrong, except when expressly allowed by statute. *Corcoran v. Postal Telegraph-Cable Co.* 570

2. **DAMAGES—PERSONAL INJURIES—MEDICAL ATTENTION—INSTRUCTIONS.** In an action for personal injuries, the jury may consider the cost of medical attention, although there was no charge made by the doctor for services at the hospital, or that he had presented any bill or would do so, where the doctor testified that he treated the plaintiff after he left the hospital, and, when asked about his bill, had stated that \$500 would be a reasonable charge for the operation. *Francy v. Seattle Taxicab Co.*..... 396

DAMAGES—CONTINUED.

3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,000 for injuries to a disabled knee, twice previously injured and already in a chronic tubercular condition, is excessive, and should be reduced to \$2,500. *Rice v. Puget Sound Traction, Light & Power Co.* 47
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$3,202, for personal injuries sustained by a child, whose hand was crushed so that it was stiff and lacked the power of gripping and probably would never be as strong as a normal hand, and one finger had to be amputated, is not so excessive as to indicate passion or prejudice. *Gregg v. King County* 196
5. **DAMAGES—PERSONAL INJURIES — EXCESSIVE DAMAGES — REMISSION.** A verdict for \$9,250, in an action for personal injuries, is more than compensatory, although the plaintiff was seriously injured, where it appears that she was not entirely incapacitated and deprived of her earning power, that, at the time of injury, she was forty-eight years of age, earning \$30 per month with continuous employment, and capable of earning as a nurse from \$15 to \$25 per week with intermittent employment, and that her actual loss in the way of clothing and doctor's bills did not exceed \$300; and warrants a reversal and new trial in the case, unless plaintiff files remittitur of \$4,250. *Guignon v. Campbell* 543

DEATH:

- Of employee, see **MASTER AND SERVANT**, 2-6, 10, 16.
- Inadequate damages for as ground for new trial, see **NEW TRIAL**, 4, 5.

DEBT:

- Provision for payment of on discharge of guardian, see **INSANE PERSONS**, 1.
- Issuance of bonds for enlarging light and power plant, limitation, see **MUNICIPAL CORPORATIONS**, 14-16.

DECEDENTS:

- Estates, see **EXECUTORS AND ADMINISTRATORS**.
- Gifts *causa mortis*, see **GIFTS**.
- Testimony as to transactions with, see **WITNESSES**, 1.

DECEIT:

- See **FRAUD**.

DECISION:

- Decisions reviewable, see **APPEAL AND ERROR**, 1, 2.
- Common law as rule of decision, see **COMMON LAW**.

DECLARATIONS:

- Dying declarations, see **HOMICIDE**, 2.

DEDICATION:

Abandonment of dedicated street, see **HIGHWAYS**.

1. **DEDICATION—VACATION OF STREETS—ABANDONMENT—DEED AS IRREVOCABLE DEDICATION.** Upon an issue as to the vacation of a street in an unincorporated town by failing to open the same within five years after the filing of the plat, conveyances of certain lots and blocks by reference to the plat do not operate as an irrevocable dedication of the streets, where the purchasers were not parties to the litigation and their rights could not be affected by the result. *Smith v. King County* 273
2. **DEDICATION—VACATION OF STREETS—ABANDONMENT—DEED AS REDEDICATION—REVOCATION THEREOF.** Where streets in an unincorporated town were vacated by abandonment, a deed of general warranty subject to all easements, rights and privileges granted to the public by the plat and dedication thereof, does not operate as a rededication of the streets, since the easements therein had been extinguished by operation of law; especially where, twenty days later, the grantees acquired title by a deed of general warranty without any exception clause; since any implied easement would be thereby revoked. *Smith v. King County*..... 273

DEEDS:

Covenants in deeds, see **COVENANTS**.

As rededication of vacated streets, see **DEDICATION**.

Estoppel by deed, see **ESTOPPEL**, 1.

DEFAULT:

Judgment by, vacation, see **JUDGMENT**, 1, 5.

Power to grant writ of mandamus by default, see **MANDAMUS**.

DEFECT:

In city street, see **MUNICIPAL CORPORATIONS**, 6, 7, 11.

DEFINITENESS:

Of complaint in action for injuries from collision with automobile, see **PLEADING**, 1.

DELAY:

In prosecution of action, presumption from, see **ACTION**, 2.

In filing complaint as affecting jurisdiction to enter default, see **JUDGMENT**, 1.

In transmission of message, see **TELEGRAPHS AND TELEPHONES**.

DELIVERY:

Liability of carrier for wrongful delivery, see **CARRIERS**, 7, 8.

Of gift, see **GIFTS**.

Place of delivery and execution of policy, see **INSURANCE**, 1.

Of goods sold, see **SALES**, 4, 5.

Of telegrams, see **TELEGRAPHS AND TELEPHONES**.

DEMAND:

Necessity of in replevin, see **REPLEVIN**, 1.

DENIALS:

In pleading, see **PLEADING**, 2, 3, 5.

DEPOSITS:

In bank, see **BANKS AND BANKING**.

To cover cost of printing arguments for or against initiative measures, see **STATUTES**, 5, 6.

DESCRIPTION:

Estoppel of grantor to claim error in description in deed, see **ESTOPPEL**, 1.

DEVISES:

See **WILLS**.

DILIGENCE:

In prosecution of action, see **ACTION**, 2.

In prosecution of appeal from conviction in justice court, see **CRIMINAL LAW**, 3.

DISCHARGE:

Of guardian of insane person, see **INSANE PERSONS**, 1.

Of jury for failure to agree, see **JUSTICES OF THE PEACE**, 1-3.

From employment, see **MASTER AND SERVANT**, 11.

DISCRETION:

Of Industrial Insurance Commission in making award for injuries to employee, see **MASTER AND SERVANT**, 9.

DISCRETION OF COURT:

Rulings on motion to dismiss, see **APPEAL AND ERROR**, 7.

Review of rulings on motion for new trial, see **APPEAL AND ERROR**, 15, 16.

Allowing special counsel to aid prosecuting attorney in criminal trial, see **CRIMINAL LAW**, 5.

Review of discretion in denying continuance, see **CRIMINAL LAW**, 12.

Grant of new trial for inadequate damages, see **NEW TRIAL**, 4.

DISCRIMINATION:

In rates by water company, see **WATERS AND WATER COURSES**.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 2, 7.

Dismissal of accused for failure to prosecute appeal from conviction in justice court, see **CRIMINAL LAW**, 3.

DISORDERLY HOUSE:

Abatement of under "Red Light Law," see **NUISANCE**.

DISTRIBUTION:

Fraud in distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

DIVORCE:

Judgment as bar to subsequent action, see **JUDGMENT**, 3, 4.

1. **DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY.** In an action for divorce, findings of cruelty on the part of the husband are not warranted, where, by a former judgment denying the wife a divorce, it was determined that she was the one at fault, and that she had left her home without just cause, and since the entry of the former judgment there was no conduct of the husband amounting to cruelty, the wife testifying that she would not live with him under any circumstances. *Averbuch v. Averbuch*..... 257
2. **DIVORCE—ALIMONY—ALLOWANCE.** The allowance of alimony where the right is established, should be measured by the necessities of the parties. *Herrett v. Herrett*..... 474
3. **SAME—ALIMONY—MODIFICATION—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to warrant the increase of a \$75 monthly payment of alimony, where it appears that the defendant had paid alimony due, furnished plaintiff with free house rent and groceries, that his business had decreased since the divorce, and he had remarried, and a salary of \$100 a month had been increased to only \$125 a month. *Herrett v. Herrett*..... 474
4. **SAME—ALIMONY—DECREE—VALUE OF PROPERTY—CONCLUSIVENESS.** In a divorce action, a finding as to the value of the property is not conclusive upon a subsequent motion to modify the decree for alimony. *Herrett v. Herrett*..... 474
5. **SAME—CUSTODY OF CHILDREN—DECREE—VIOLATION.** A divorced wife violates the spirit of the decree permitting the children to visit the father, where she prejudiced them against him because of his remarriage; and should be required to cease doing so. *Herrett v. Herrett* 474
6. **DIVORCE—CUSTODY OF CHILDREN—DECREE—MODIFICATION—EVIDENCE—SUFFICIENCY.** The modification of a decree of divorce so that the defendant, who had remarried, should not be allowed to visit or entertain his children in the presence of his wife, is error, where the only evidence to warrant it was that the wife had given each of the children a new penny and baked cookies and a birthday cake for them, and there were no aspersions against her character or home. *Herrett v. Herrett*..... 474

DOCKS:

Public dock as dangerous place attractive to children, see **NESLIGENCE**, 3, 5.

Liability of county for safety in maintaining public dock, see **WHARVES**.

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 2, 3.

DYING DECLARATIONS:

See **HOMICIDE**, 2.

EASEMENTS:

See **DEDICATION**.

ELECTION:

Harmless error in refusal to require election between inconsistent theories in complaint, see **APPEAL AND ERROR**, 19.

To exercise option to terminate lease, see **LANDLORD AND TENANT**.

ELECTIONS:

Cost of printing arguments in support of initiative measures, see **STATUTES**, 5, 6.

ELECTRICITY:

Issuance of bonds for enlarging light and power plant, limitation of debt, see **MUNICIPAL CORPORATIONS**, 14-16.

EMINENT DOMAIN:

Condemnation of property for future public use as taking without due process of law, see **CONSTITUTIONAL LAW**, 3.

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 3-5.

1. **EMINENT DOMAIN—PUBLIC USE—TAKING OF LAND FOR PARK.** The taking of lands for public parks, boulevards and parkways is a public use. *Spokane v. Merriam*..... 222
2. **EMINENT DOMAIN—PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY.** Where ordinances providing for condemnation declared that property sought to be taken was necessary for park purposes, and a recital of the facts upon which such declaration was based would not further establish its truth or good faith, in the absence of some charge of fraud, and it was further shown that the land sought was required to connect two other tracts donated to the city for park purposes and which could only be retained by securing the property sought, and that the request of the park board for the condemnation had been recommended by the committee appointed by the council to investigate the same, the evidence was sufficient to show a reasonable necessity for the taking of the land for park purposes, and that the taking was sought in good faith. *Spokane v. Merriam*..... 222

EMINENT DOMAIN—CONTINUED.

3. **SAME.** Such evidence is admissible on the question of the public use and necessity for condemning the land. *Spokane v. Merriam* 222
4. **SAME—PUBLIC NECESSITY.** In condemning lands for park purposes, a city need not show an immediate necessity for an immediate use, but has a right to anticipate future needs. *Spokane v. Merriam* 222
5. **EMINENT DOMAIN — BY MUNICIPAL CORPORATIONS — PROCEEDINGS — PREREQUISITES—NECESSITY OF ATTEMPTING TO AGREE.** The provision of Spokane city charter, art. 5, § 49, relating to condemnations, which provides that if the park board shall be unable to purchase at a satisfactory price, any lands sought, the council shall, upon notice given by the board, condemn the same, is not a valid limitation upon the power of the city to condemn only where effort to secure the property sought by agreement has failed; in view of the general statutes, Rem. & Bal. Code, §§ 7768-7771, conferring the power of eminent domain and fixing the procedure, without any such limitation or any reference to any action by the park board or authority to delegate any part of the power to the park board. *Spokane v. Merriam*.. 222
6. **SAME—PROCEEDINGS—CONDITIONS PRECEDENT—PRESUMPTIONS.** The statutes having entrusted to the city council the power to initiate condemnation proceedings by ordinance, in the absence of fraud the courts will presume that all antecedent executive and quasi judicial investigation prescribed by law preceded the adoption of an ordinance invoking the exercise of the power of eminent domain by a city. *Spokane v. Merriam*..... 222
7. **SAME—CONDITIONS PRECEDENT — JURISDICTION — WAIVER OF OBJECTION.** The failure to agree upon the price of land sought is not a condition precedent to the institution of condemnation proceedings, unless it is so prescribed in the act; hence a failure to allege or prove the same is not a jurisdictional defect and is waived if not raised below. *Spokane v. Merriam*..... 222
8. **EMINENT DOMAIN — PARTIES — STATUTORY PROCEEDINGS — LESSEES.** In providing the procedure for the exercise of the power of eminent domain, it was competent for the state, by Rem. & Bal. Code, § 921, to require service only upon owners and persons interested in the land "so far as the same can be ascertained from the public records;" especially in view of Id., §§ 929-931 providing a method for determining conflicting interests or claims to the award; hence it is not necessary to bring in as parties defendant, lessees who failed to record their lease. *State ex rel. Long v. Superior Court*..... 417
9. **EMINENT DOMAIN—AWARD — CONCLUSIVENESS.** The jury's award for damages for land taken and damaged by a street improvement is conclusive if not reviewed in the condemnation proceeding, and cannot, if excessive, be corrected by the eminent domain commission-

EMINENT DOMAIN—CONTINUED.

- ers as an excessive assessment for benefits against the property.
In re Fifth Avenue West..... 464
10. SAME—AWARD—PARTIES CONCLUDED—LESSEES WITH NOTICE. Where record owners of land defended eminent domain proceedings as holders of the full legal title, lessees who had not recorded their lease, and had not been made parties, are bound by the award, where they had notice of the suit and were present at the trial without asserting any claim or interest in the land. *State ex rel. Long v. Superior Court* 417
11. EMINENT DOMAIN—PROCEEDINGS—APPEAL—SUPERSEDEAS. The supreme court has jurisdiction to grant a supersedeas pending an appeal from a judgment in condemnation proceedings, and Rem. & Bal. Code, § 7783, providing that no appeal from a judgment entered upon an award from a jury shall delay proceedings under an ordinance directing a public improvement, is not applicable thereto, where the award was only for the user by the public of the company's right of way for street purposes, and made no provision for the expense of readjusting its tracks to conform to the surface of the street after it has been brought to the grades established by the ordinance authorizing the improvement, and moreover it was questionable whether the city had the power to condemn land for a street longitudinally over land owned by the company in fee and occupied by its tracks; since it appears that, should the questions raised by the appeal prove meritorious, the constitutional rights of the appellant will be violated if the supersedeas is not granted. *In re Rainier Avenue*..... 688
12. SAME—PROCEEDINGS—AWARD—APPORTIONMENT—RIGHTS OF LESSEES. In eminent domain proceedings, where the award was for the full value of the land, lessees who failed to record their lease and therefore were not necessary parties, under Rem. & Bal. Code, § 921, have no claim against the petitioner, but must seek their proportion of the award under Id., §§ 929-931. *State ex rel. Long v. Superior Court* 417
13. EMINENT DOMAIN—ACTION FOR DAMAGES—REMOVAL OF LATERAL SUPPORT—TRIAL—INSTRUCTIONS. In an action against a city for damages in grading a street, by reason of undermining the support and foundation of plaintiff's lot and the explosion of dynamite in such a manner as to burst plaintiff's water pipes and loosen the earth under his house and the lateral support of the ground upon which the house was located, thereby causing the earth in front of the house to slide, the theory of the case is based upon the physical injury or direct invasion of property rights, under the constitutional inhibition against damaging private property for public use without just compensation, and not upon the negligent acts of the defendant, and hence instructions basing right of recovery upon the negligence of defendant were erroneous. *Johanson v. Seattle*..... 527

EMINENT DOMAIN—CONTINUED.

14. **EMINENT DOMAIN—RIGHT OF WAY — REVERSION — ABANDONMENT—INTENTION—EVIDENCE—SUFFICIENCY.** The evidence sustains a finding that a railway company had not abandoned a portion of its right of way and terminal grounds, condemned in anticipation of future needs, by leasing the same for a nominal sum to a wholesale concern for a warehouse, in return for an agreement for business, for the term of fifteen years with privilege of a ten-year renewal, where, pending trial, the lease was changed to shorten the term and give the company the right to terminate the lease on one year's notice, directors of the company testified that the company did not intend to abandon its easement, and the evidence was to the effect that all the grounds would soon be needed for and put to public uses of the company, and that the handling of freight was economized and the business of the railroad increased by the use of the buildings of the lessee. *Neitzer v. Spokane International R. Co.*..... 30
15. **SAME — RIGHT OF WAY — REVERSION — ABANDONMENT—MISUSE.** A private use of a part of the terminal grounds of a railroad company by a wholesale concern for a warehouse, under a lease for nominal rent, upon an agreement to give the road all the lessee's business, does not work a reversion, when there was no abandonment of the easement; there being no reversion by misuse without abandonment, so long as the private use is incidental or contributed to the company's transportation business. *Neitzel v. Spokane International R. Co.* 30
16. **SAME—RIGHT OF WAY — REVERSION — ACTIONS — EVIDENCE OF INTENT—ADMISSIBILITY.** In an action to declare a reversion of terminals, condemned for railroad purposes, which the company had leased for a warehouse, for nominal rent upon an agreement for all of the lessee's business, evidence that warehouses upon terminal grounds reduced the cost of unloading freight is admissible on the question whether the company in making the lease intended to abandon the easement. *Neitzel v. Spokane International R. Co.*... 30
17. **SAME.** In such a case, evidence that the lease was to obtain the business, and that it was worth \$20,000 a year, is admissible upon the question whether the making of the lease showed an intent to abandon the easement. *Neitzel v. Spokane International R. Co.*... 30
18. **SAME.** In such a case, the cancellation of a lease pending trial, and the execution of another for a shorter term, giving the company the right to terminate it on one year's notice, is admissible as a circumstance upon the question of intent. *Neitzel v. Spokane International R. Co.* 30
19. **SAME—INSTRUCTIONS.** Instructions in such a case summarized, and held to correctly state the law of the case. *Neitzel v. Spokane International R. Co.* 30

EMPLOYEES:

See MASTER AND SERVANT.

ENROLLMENT:

Enrolled bill, conflict with printed law, see STATUTES, 4.

EQUALIZATION:

Findings of board of equalization, review of, see TAXATION, 2.

EQUITY:

See TRUSTS.

Distinction between law and equity actions, see ACTIONS, 1.

Effect of prayer for equitable relief in law action by creditor of insolvent corporation to recover on unpaid stock subscription, see CORPORATIONS, 5.

Enjoining breach of contract, see INJUNCTION.

ESTABLISHMENT:

Of waterway district, see CANALS.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Trusts, see TRUSTS.

Created by will, see WILLS.

ESTOPPEL:

Failure of administrator to include claim against former executor in report as estoppel to sue for money converted, see EXECUTORS AND ADMINISTRATORS, 1.

Of lessor to question validity of unacknowledged lease, see FRAUDS, STATUTE OF, 3.

By judgment, see JUDGMENT, 2-4.

1. ESTOPPEL—IN PAIS—INCONSISTENT CLAIMS—ERROR IN DEED. A grantor is estopped to claim error in the description by metes and bounds in his deed, in that it contained a larger tract on the north side than he intended to convey, which he had marked on the ground at the north by monuments, where, years after, to settle a dispute with a predecessor in interest of the grantee as to the location of the south boundary, he ignored his monuments, and measured the ground from the calls in the deed, which he adopted, and thereby gained his contention as to the south boundary, which he would have lost if he had followed his monuments and present claim of error. *McIver v. Hilstad*..... 206
2. ESTOPPEL—PARTIES ENTITLED TO CLAIM. An estoppel operates only in favor of those who have been misled to their injury, and they alone can set it up. *Smith v. King County*..... 273

ESTOPPEL—CONTINUED.

3. **ESTOPPEL—PLEADING—NECESSITY.** Where the facts constituting an estoppel to deny a lease are set forth in the pleadings, and early in the trial the pleader assumed that he relied upon an estoppel to deny the lease, to which no claim of surprise was interposed nor request for a continuance made, the objection that an estoppel was not specifically pleaded is unavailable. *Matzger v. Arcade Building & Realty Co.* 401

EVIDENCE:

- See **LIBEL AND SLANDER**, 4, 5; **PERJURY**.
 Review on appeal, see **APPEAL AND ERROR**, 5, 6.
 Incorporation in record on appeal, see **APPEAL AND ERROR**, 9, 10.
 Harmless error in rulings on, see **APPEAL AND ERROR**, 22, 23.
 Negligence of bailee, see **BAILMENT**, 2.
 On note, see **BILLS AND NOTES**, 1.
 In criminal prosecutions, see **CRIMINAL LAW**, 2.
 Comment on, by judge, see **CRIMINAL LAW**, 6.
 Review on appeal or writ of error, see **CRIMINAL LAW**, 9, 10.
 Cruelty, see **DIVORCE**, 1.
 To warrant modification of decree, see **DIVORCE**, 3, 6.
 Condemnation proceedings, see **EMINENT DOMAIN**, 2-4, 14, 16-18.
 Intent to abandon easement condemned by railroads, see **EMINENT DOMAIN**, 14-18.
 Fraud of administrator in distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.
 Cause of explosion, see **EXPLOSIVES**.
 Of fraud, sufficiency, see **FRAUD**, 2.
 To show gift *causa mortis*, see **GIFTS**.
 In prosecution for murder, see **HOMICIDE**.
 Cause of accident, see **INSURANCE**, 2.
 For personal injuries, see **MASTER AND SERVANT**, 10, 14, 16; **MUNICIPAL CORPORATIONS**, 6, 12; **RAILROADS**, 2.
 Maintenance of dangerous agency, see **NEGLIGENCE**, 4.
 Newly discovered as ground for new trial, see **NEW TRIAL**, 6.
 Good faith of parties in abandoning house of prostitution, see **NUTRANCE**, 3.
 Of value of property in replevin suit, see **REPLEVIN**.
 Delivery of goods sold, see **SALES**, 4.
 Performance of contract, see **SALES**, 6.
 In prosecution for seduction, see **SEDUCTION**, 2-5.
 Comment on by judge, see **TRIAL**, 1, 2.
 Fraud of vendor inducing sale of land, see **VENDOR AND PURCHASER**, 2.
 Testimony of witnesses, see **WITNESSES**.
1. **EVIDENCE—JUDICIAL NOTICE.** The courts will take judicial notice of the fact that in large and populous counties there are many units within the local option law. *State v. Miller*..... 368

EVIDENCE—CONTINUED.

2. **EVIDENCE—PRESUMPTIONS—JUDGMENT.** It is presumed, in the absence of evidence to the contrary, that the judgment of a court of general jurisdiction is regular, and its recitals are *prima facie* evidence of the facts therein stated. *Kline Brothers & Co. v. North Coast Fire Ins. Co.*..... 609
3. **EVIDENCE—HEARSAY—RES GESTAE.** Evidence of statements made by an employee after an injury resulting in his death is not admissible as part of the *res gestae*, where they in no way explained or characterized the main fact, but were concerning what happened just prior to the accident, being merely the narration of a past event. *Hobbs v. Great Northern R. Co.*..... 678

EXAMINATION:

Of witnesses in general, see **WITNESSES**.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 4-6.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see **APPEAL AND ERROR**, 9.

EXCESSIVE ASSESSMENT:

See **MUNICIPAL CORPORATIONS**, 5; **TAXATION**, 2-6.

EXCESSIVE DAMAGES:

See **DAMAGES**, 3-5.

EXCUSE:

For delay in prosecution of appeal from conviction in justice court, see **CRIMINAL LAW**, 3.

EXECUTION:

Exemptions, see **EXEMPTIONS**.

Right of defendant to stay of, on being garnisheed as debtor pending suit of replevin, see **GARNISHMENT**.

Place of execution of policy, see **INSURANCE**, 1.

Prohibition to prevent issuance of, on judgment pending appeal, see **PROHIBITION**.

EXECUTORS AND ADMINISTRATORS:

Testimony as to transactions with decedents, see **WITNESSES**, 1.

1. **EXECUTORS AND ADMINISTRATORS—CLAIMS—ESTOPPEL.** The fact that an administratrix *de bonis non* had, from time to time since her appointment, made reports without including a claim against the former executor for money converted, would not estop her from suing his personal representatives for the conversion, as it was not properly an asset of the estate so long as the money was withheld or the will unconstrued. *Denton v. Schneider*..... 506

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. **EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—VACATION—FRAUD—EVIDENCE—SUFFICIENCY.** Fraud on the part of an administrator in securing final distribution of the whole estate to himself, as widower of the deceased, on the theory that the property was their community property, to the exclusion of the mother of the deceased, who claimed an interest in that the property was deceased's separate estate, is not shown by clear and satisfactory evidence, from the fact that the administrator at first wrote a letter stating that the property would be distributed to them both as sole heirs, where the letter stated that the property was community property, and shortly after, long before distribution, both by letter and personally, he explained that he had been mistaken as to the rule of descent of community property, and claimed to be the sole heir, and such claim was unquestioned until after final distribution. *Doyle v. Langdon* 175
3. **EXECUTORS AND ADMINISTRATORS—ADMINISTRATOR DE BONIS NON—RIGHT TO SUE—STATUTES.** Under Rem. & Bal. Code, §§ 1430, 1431, 1538, providing that, in the case of the removal or death of an executor or administrator, he or his representative shall account to his successor, that the succeeding administrator may proceed by law against any delinquent former executor or his personal representatives, and that any administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor or of any former administrator of the same estate, authority is conferred upon an administrator *de bonis non* to maintain an action against a former executor or his personal representatives for the conversion of the rents and profits coming into his hands. *Denton v. Schneider* 506

EXEMPTIONS:

Validity of clause in free pass exempting carrier from liability, see **CARRIERS**, 9.

Subject and title of act relating to wage exemptions, see **STATUTES**, 2.

1. **EXEMPTIONS—PROPERTY EXEMPT—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 563, subd. 4, providing for an exemption to a householder of specified domestic animals, with a proviso that, if the householder does not possess or desire to retain the animals named, he may select and retain "other property" not to exceed two hundred and fifty dollars in value, the "other property" to be selected must be property of a like nature, under the rule of *ejusdem generis*; hence money cannot be selected in lieu of such exempt property. *Creditors Collection Association v. Bisbee* 358

EXPERT TESTIMONY:

Testimony of experts, see **WITNESSES**, 4.

EXPLOSIVES:

1. **EXPLOSIVES—NEGLIGENCE—CAUSE OF EXPLOSION—EVIDENCE—SUFFICIENCY.** Recovery for negligence in installing gasoline tanks in a launch, in that a pipe leading to one of the tanks was not properly fitted, is properly denied on the ground that the cause of an explosion, when the tanks were first filled, was not proven but left to conjecture, where it does not appear that any gasoline leaked from the pipe in question, but only that it might have done so, and that the explosion was caused by gasoline leaking on the engine and which might have come from the deck when the other two tanks were filled, or from the supply pipes from one of the other tanks. *Chilberg v. Colcock*..... 392

EXPRESS COMPANIES:

- Power to renounce intrastate business, see **CARRIERS**, 5.
Excise tax as regulation of commerce, see **COMMERCE**.

EXTRA WORK:

- Right of contractor to recover for, under state contract for road construction, see **STATES**.

FACTORS:

1. **FACTORS—POWERS—TITLE OF PROPERTY—SALE FOR PREEXISTING DEBT.** A factor of goods consigned for sale on commission cannot sell or pass title in consideration of a preexisting debt, regardless of whether the purchaser had notice that he was a factor; innocent purchasers not being protected where they acquire goods of a factor outside of accustomed methods. *Eilers Music House v. Fairbanks* 379

FEDERAL LIABILITY ACT:

- See **MASTER AND SERVANT**, 10.

FEES:

- Payment of filing fee on appeal, see **APPEAL AND ERROR**, 7.

FELLOW SERVANTS:

- See **MASTER AND SERVANT**, 13-15.

FILING:

- Notice of appeal, see **APPEAL AND ERROR**, 8.
Abstract of record on appeal, see **APPEAL AND ERROR**, 11, 12.
Articles of incorporation containing name similar to existing corporation, see **CORPORATIONS**, 1.
Claims against city for damages, see **MUNICIPAL CORPORATIONS**, 17-21.

FINAL JUDGMENT:

- Appealability, see **APPEAL AND ERROR**, 1.

FINDINGS:

Necessity of exceptions for purpose of review, see **APPEAL AND ERROR**, 5, 6.

FIRE INSURANCE:

See **INSURANCE**, 1.

FIRES:

Setting out fire without permit, see **NEGLIGENCE**, 1, 2.

FISH:

Subject and title of act for protection of game fish, see **STATUTES**, 1.

1. **FISH—PROTECTION AND REGULATION—USE OF NETS—STATUTES—IN PARI MATERIA—IMPLIED REPEAL—CONSTRUCTION.** The legislature, in enacting the game code of 1913 (3 Rem. & Bal. Code, § 5395-1 *et seq.*), for the protection of game fish, had power to prohibit, by Id., § 5395-46, the use of nets in fresh water above tide water as a nuisance; and having done so in clear language, the act of 1909 (2 Rem. & Bal. Code, § 5183), relating to the protection of food fish, and permitting the use of nets for the taking of salmon for food in all waters, must give way in so far as it conflicts with the game code; the two statutes being *in pari materia*, and to be construed together. *State v. Allen*..... 83

FORECLOSURE:

Of lien, see **MECHANICS' LIENS**.

Of mortgage given by purchaser of trust estate, see **TRUSTS**.

FOREIGN JUDGMENTS:

See **JUDGMENT**, 5, 6.

FORMER ADJUDICATION:

See **JUDGMENT**, 2-4.

FRAUD:

See **SALES**, 3.

Of administrator in securing final distribution of estate to himself, see **EXECUTORS AND ADMINISTRATORS**, 2.

In assessment of tax, see **TAXATION**, 4-6.

Sales of realty, see **VENDOR AND PURCHASER**, 1, 2.

1. **FRAUD—FALSE REPRESENTATIONS—ACTIONS—DEFENSES.** False representations of material facts whereby a party was induced to sign a note are actionable, whether the party making them knew them to be false or not. *Agnew v. Hackett*..... 236
2. **FRAUD—MISREPRESENTATIONS—ACTION FOR DAMAGES—EVIDENCE—QUESTION FOR JURY.** Whether the defendant was guilty of fraud in inducing a sale of a one-half interest in a second-hand furniture business is a question for the jury, where the defendant represented

FRAUD—CONTINUED.

the stock as worth \$11,413, that the business had made a profit of \$4,600 the preceding year, and that a note given by plaintiff as balance of the purchase price could be paid from the profits, when in fact the stock was worth less than \$5,000, the profits were less than \$2,000, and no profits resulted after the giving of the note, the plaintiff testifying that he was ignorant concerning goods of the character purchased, the cost thereof or the selling price, but that he relied upon an inventory made by the defendant and upon representations made by him and the broker who handled the sale, the latter being an intimate acquaintance of some years, and it appeared that had plaintiff examined the books he would have been unable to determine what the stock was worth or what the profits had been. *Duffy v. Blake*..... 643

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—CONTRACTS FOR SALE OF REAL ESTATE—EXECUTION—SUFFICIENCY.** A memorandum of purchase of certain described real estate, signed by the purchaser, "subject to the owner's approval," but not signed by the owner, nor even disclosing his name though signed by an agent authorized orally to find a purchaser, does not constitute a contract of sale of land within the terms of Rem. & Bal. Code, §§ 8745, 8746, requiring contracts for the conveyance of real estate to be "in writing signed by the party bound thereby;" since the purchaser is the only party bound by the terms of the contract. *Arbogast v. Johnson*..... 537
2. **SAME—SALE OF REAL ESTATE—CONTRACT OF AGENT—RATIFICATION.** Ratification of a sale of real estate made by an agent for the owner, which was unenforceable under the statute of frauds, is not shown by the act of the owner in receiving the earnest money paid to his agent by the purchaser who was a tenant of the owner, but declining to approve the sale and applying the money on the rent due, nor by the further fact that the owner gave his agent an abstract of title to deliver to the prospective purchaser, coupled with the understanding that it was not to be delivered until the payment of an additional specified sum as earnest money. *Arbogast v. Johnson* 537
3. **FRAUDS, STATUTE OF—WAIVER OF BAR—PART PERFORMANCE—ESTOPPEL.** A lessor is estopped to question the validity of an unacknowledged lease for a term of five years, where it appears that, to secure the lease, the tenant cancelled a prior valid lease and paid \$2,200 increased rentals for the last eight months of the term thereof, that after the lease had run four years the lessor, on denying an application for a renewal at the end of the term, recognized the lease by telling the agent he could remain for the end of the term (making in effect a new lease for less than a year), and that the lessee, upon the faith thereof, invested \$30,000 in new stock upon which he would sustain a heavy loss if required to move before the end of the year. *Matzger v. Arcade Building & Realty Co.*..... 401

FRAUDS, STATUTE OF—CONTINUED.

4. **SAME—PLEADINGS—ISSUES AND PROOF.** A party to an action may invoke the application of the statute of frauds without pleading it, where the contract in issue is set out in full in the pleadings and shows on its face that it is such a contract as is required by law to be in writing. *Arbogast v. Johnson*..... 537

FUNDS:

Validity of appropriation by commissioners in aid of county agricultural association, see **COUNTIES**.

Commingled funds, separate or community nature of, see **HUSBAND AND WIFE**, 2.

GAME:

See **FISH**.

Punishment under general statute for conviction of gross misdemeanor in hunting deer with dogs, see **CRIMINAL LAW**, 15.

GARNISHMENT:

Subject and title of act relating to wage exemptions from garnishment, see **STATUTES**, 2.

1. **GARNISHMENT—PENDING SUIT—EFFECT—STAY OF JUDGMENT OR EXECUTION.** Where, after findings for plaintiff in replevin, and pending defendant's motion for a new trial, the defendant was garnisheed as a debtor of the plaintiff, or as having property in its possession belonging to plaintiff, the defendant should be allowed to show such fact, which, if found to be true, entitled defendant to a stay of judgment or execution to the end that it might protect itself from a double liability for the same debt, until the garnishment was disposed of. *Armour v. Seixas*..... 181

GIFTS:

Validity of appropriation of funds by commissioners in aid of county agricultural association, see **COUNTIES**.

1. **GIFTS—CAUSA MORTIS—REQUISITES—DELIVERY.** Under the rule that, in order to constitute a gift *causa mortis*, the donor must not only signify his intention to make the gift, but he who asserts title by gift must prove delivery, either actual or symbolical, by clear and satisfactory evidence; such a gift is not established by evidence showing that decedent, at the time he was preparing to undergo a surgical operation, wrote, sealed and addressed, but never mailed, a letter to the lady to whom he was engaged to be married, reciting that "if anything should happen to me, I want you to have one-fourth ($\frac{1}{4}$) of my entire estate after debts, if any, are paid;" that he recovered from the operation, but died from the infirmity about a year and a half later; that subsequent to writing the above letter, he made inquiries of an attorney in regard to the execution of a will, and was told that, in the absence of a will, his estate would

GIFTS—CONTINUED.

be divided share and share alike among his sisters; and the above letter after his death, being found among his effects, still sealed, was mailed by the sisters, in ignorance of its contents, to the lady to whom it was addressed. *Fauley v. McLaughlin*..... 547

GOOD FAITH:

Of purchaser, see **BILLS AND NOTES**.

Inquiry by courts as to motive impelling passage of ordinance, see **MUNICIPAL CORPORATIONS**, 1.

Of parties in abandonment of house of prostitution, see **NUISANCE**, 3.

GUARDIAN AND WARD:

Guardianship of insane persons, see **INSANE PERSONS**.

1. **GUARDIAN AND WARD—ACCOUNTING—EXPENSES AND ALLOWANCES—APPEAL—REVIEW.** On appeal by a ward, from allowances to the guardian on final settlement, for personal expenses and expenditures involving the welfare of the ward, the supreme court will defer to the judgment of the lower court, where it was familiar with the local situation, had a great deal to do with the proceedings, and could know what was proper in determining the justness of the claims. *In re Bayer* 340

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 18-24.

In criminal prosecution, see **CRIMINAL LAW**, 6, 13.

In comment on facts by judge, see **TRIAL**, 1.

HAWKERS AND PEDDLERS:

1. **HAWKERS AND PEDDLERS—DEFINITION—SOLICITATION BY SAMPLES.** One who solicits the sale of goods by sample, in a house to house canvass, and later fills the orders by delivery from a house where he had assembled the orders from goods shipped to him, is a "peddler," both at common law, and within an ordinance for the licensing of peddlers which provided that a peddler selling from samples and maintaining a supply depot within the city shall be deemed a peddler. *Pomeroy v. Rutherford*..... 43

HEARSAY EVIDENCE:

See **EVIDENCE**, 3.

HIGHWAYS:

Accidents at railroad crossings, see **RAILROADS**, 2.

Contract for road construction, see **STATES**.

1. **HIGHWAYS — VACATION — BY ABANDONMENT — USE — SUFFICIENCY.** Streets in a plat outside of an incorporated town are not opened for public use within the space of five years after the filing of the plat, within Rem. & Bal. Code, § 5673, vacating such streets, where, during

HIGHWAYS—CONTINUED.

such time, the travel was only casual and intermittent and by foot paths through brush and stumps to reach a camping place without reference to the dedicated way. *Smith v. King County*..... 273

HOMICIDE:

1. **HOMICIDE—EVIDENCE—PRIOR ACTS OF VIOLENCE.** In a prosecution of a husband for the death of his wife, occasioned by a violent assault upon her, evidence is admissible showing previous violent assaults made by him upon her. *State v. Lewis*..... 532
2. **HOMICIDE—EVIDENCE—DYING DECLARATIONS.** Dying declarations of a deceased made four or five days before her death, tending to show that the injuries resulting in her death were made by the accused assaulting her, are admissible in evidence, where the evidence further shows that her death occurred as a direct result of the injuries received and that, at the time of making her declarations, she was under the solemn conviction of approaching dissolution. *State v. Lewis* 532

HUSBAND AND WIFE:

See **DIVORCE**; **MARRIAGE**.

1. **HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—LIABILITY FOR NEGLIGENCE OF CHILD.** A married woman is liable to a judgment for damages against her separately for personal injuries resulting to one by reason of the negligence of her child in operating an automobile, where such automobile was her separate property, and was being used by the child for family purposes with her consent. *Guignon v. Campbell* 543
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—COMMINGLED FUNDS.** There was such a commingling of separate and community funds that the court cannot say that any part of the property acquired was the separate property of the wife, where, ten years before the wife's death, certain proceeds of her separate real estate were deposited in a bank, and the husband from time to time, contributed from his earnings to the fund, from which was paid all their household expenses, as well as sums paid in the acquisition of property possessed by them at the time of the wife's death. *Doyle v. Langdon*..... 175

IDENTITY:

Of accused, sufficiency of evidence, see **CRIMINAL LAW**, 2.

IMPROVEMENTS:

Public improvements, see **MUNICIPAL CORPORATIONS**, 3-5.

INCUMBRANCES:

Covenants against, see **COVENANTS**.

INDICTMENT AND INFORMATION:

Indorsement of name of additional witness on information, see **CRIMINAL LAW**, 4.

Violation of local option laws, see **INTOXICATING LIQUORS**.

Criminal complaint for libel, see **LIBEL AND SLANDER**, 2.

1. **INDICTMENT AND INFORMATION—INCLUDED OFFENSES — MURDER — MANSLAUGHTER.** An information charging that defendant did wilfully, unlawfully, etc., and with intent to effect the death of deceased, with his hands, fists, feet and by other means violently strike etc., and otherwise abuse her, with extreme atrocity and cruelty, thereby bruising and lacerating her body, face, head and neck and mortally wounding her, of which mortal wounds she died, includes a charge of manslaughter as well as of murder, and the question of his guilt of either crime was properly submitted to the jury. *State v. Lewis*..... 532

INDORSEMENT:

Of name of witness on information, see **CRIMINAL LAW**, 4.

INDUSTRIAL INSURANCE:

Effect of departmental construction of act, see **STATUTES**, 3.

INFANTS:

See **GUARDIAN AND WARD**.

Custody and support on divorce of parents, see **DIVORCE**, 5, 6.

Annulment of marriage, see **MARRIAGE**.

As within protection of industrial insurance act, see **MASTER AND SERVANT**, 3-5.

Liability of community to third person for injury from negligence of child in driving automobile, see **MASTER AND SERVANT**, 17.

Contributory negligence on part of children, see **NEGLIGENCE**, 6.

Injury to child from loose fender-pile on public dock, see **WHARVES**.

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION**.

INITIATIVE MEASURES:

Cost of printing arguments, see **STATUTES**, 5, 6.

INJUNCTION:

To prevent street railway company from abandoning part of line, see **CARRIERS**, 4.

Against disorderly house, under "Red Light Law," see **NUISANCE**, 3.

1. **INJUNCTION—BREACH OF CONTRACT—DAMAGES — PLEADINGS — ISSUES.** An action to enjoin the county commissioners from re-letting a contract for state highway work, under 3 Rem. & Bal. Code, § 5879-1 *et seq.*, and from interfering with the plaintiff in the performance of a contract let to it for the same work, does not state a

INJUNCTION—CONTINUED.

cause of action for damages, where neither the county nor state was made a party, and there was no allegation of the incurring of expense or of possible profits in the performance of plaintiff's contract; and mere uncertainty in the measure of damages is not ground for maintaining an action to restrain a breach of contract. *Barber Asphalt Paving Co. v. Hamilton*..... 51

IN PAIS:

Estoppel, see ESTOPPEL, 1.

INSANE PERSONS:

1. INSANE PERSONS—GUARDIANSHIP—TERMINATION—DISCHARGE OF GUARDIAN—DEBTS. Where an insane ward is found to be competent, she is entitled to the immediate full control of both her person and estate, under Rem. & Bal. Code, § 1671, and it is proper to discharge the guardian, making proper provision for the payment of unpaid debts or matters involving the striking of a balance between the guardian and ward, without making provision for the payment of debts and expenses of the guardian from the property then in his hands. *In re Bayer*..... 340
2. INSANE PERSONS—GUARDIANSHIP—ACCOUNTING—EXPENSES—ADDITIONAL ATTORNEYS—NECESSITY. A guardian is not warranted in employing special counsel to defend proceedings for his removal, or to establish the ward's sanity, or to meet objections to his final account, where the issues were not complicated and the general counsel of the guardian was fully able to handle the matters, no necessity for additional counsel being shown. *In re Bayer*..... 340
3. SAME—EXPENDITURES—APPEAL—FINDINGS. Findings as to necessary traveling expenses of a guardian will not be disturbed on appeal where the lower court was in a better position than the appellate court to try the fact, and the findings do not appear to be contrary to the preponderance of the evidence. *In re Bayer*..... 340

INSOLVENCY:

Of corporation, see CORPORATIONS, 4.

INSTRUCTIONS:

Harmless error in charge to jury, see APPEAL AND ERROR, 24.

In criminal prosecutions, see CRIMINAL LAW, 1, 8, 13; SEDUCTION, 1.

In civil actions, see TRIAL.

INSURANCE:

Jurisdiction of action between foreign corporations on policy of insurance, see CORPORATIONS, 6.

1. INSURANCE—POLICY—PLACE OF EXECUTION AND DELIVERY. A contract of insurance was made, executed, and delivered in the state of New York, where an insurance company of this state furnished blank

INSURANCE—CONTINUED.

contracts to its agent in New York authorized to issue the contract and countersign and make it valid, and to collect the premium and deliver the policy, all of which it did in the state of New York. *Kline Brothers & Co. v. North Coast Fire Ins. Co.*..... 609

2. **INSURANCE—ACCIDENT INSURANCE—ACTIONS—CAUSE OF FIRE—EVIDENCE—QUESTION FOR JURY.** In an action upon an accident policy insuring against accidental injuries "by the burning of a building while the beneficiary is therein," there is sufficient evidence to make a question for the jury as to whether the beneficiary's dress caught fire from the "burning of a building," where the fire was discovered when she was sitting near a stove in the dining room, and she supposed that a blanket caught fire from the stove, but it appears that she had just previously been to the kitchen, where a burning stick was found on the floor, the linoleum and carpet in front of the kitchen range were on fire, fire had extended to and burned the floor of the next room, and it is reasonably certain that her dress caught fire from the fire in the kitchen. *Pierre v. Kansas City Casualty Co.* 347

INTENT:

To abandon easement, evidence of, see **EMINENT DOMAIN**, 14-18.
Of testator, see **WILLS**.

INTERROGATORIES:

See **PLEADING**, 4.

Harmless error in refusal to require answers to, see **APPEAL AND ERROR**, 18.

INTERSTATE COMMERCE:

Regulation, see **COMMERCE**.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—INFORMATION—SUFFICIENCY—CERTAINTY—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 6309, providing that it shall be unlawful to bring intoxicating liquor into any unit in which the sale is prohibited, and § 6310 prescribing the requisites for indictments and informations, dispensing with particular statements in various particulars, such as descriptions of the place and names of the persons to whom sales are made, an information for bringing liquor into a dry unit in a certain county is insufficient where it fails to allege in which one of several dry units the offense was committed, in view of Const., art. 1, § 22, giving the accused the right to demand the nature and cause of the accusation, and in view of the clause in § 6310, referring to "the unit where the violation is alleged to have occurred." *State v. Muller*..... 368

INTOXICATING LIQUORS—CONTINUED.

2. **SAME.** In such a case, it is immaterial and unnecessary to state from what place the liquor was brought into the dry unit. *State v. Muller* 368
3. **SAME—INFORMATION—GUILTY KNOWLEDGE.** An information charging that defendant unlawfully and wilfully brought liquor into a dry unit, sufficiently alleges guilty knowledge and evil intent. *State v. Muller* 368
4. **SAME—INSTRUCTIONS—ELEMENTS OF OFFENSE.** Under the local option law making knowledge an essential element of the offense of bringing liquor into a dry unit, it is error to refuse to instruct the jury that guilty knowledge on the part of the accused was one of the elements of the offense, to be proved beyond a reasonable doubt, to warrant a conviction. *State v. Muller*..... 368

JOINT ADVENTURES:

1. **JOINT ADVENTURES—CONTRACTS—DIVISION OF PROFITS—DEDUCTION OF EXPENSES.** Under a contract between custom house brokers for the handling of an importing business and a division of fees thereunder, in which the fees for entry and the profits derived from cartage were to be divided on an equal basis, a finding that the division of profits for cartage should be made after deducting the actual cost of teaming is proper, and not that a proportional expense of the business should be deducted therefrom before such division, it appearing that the custom among brokers was to deduct only the cost of the haul in determining profits derived from cartage, and that the parties placed this construction upon the contract; since it was an engagement in a common enterprise upon a profit-sharing basis, and not governed by rules relating to partnership. *Bane v. Dow* 631
2. **JOINT ADVENTURES—CONTRACTS—DIVISION OF PROFITS.** Under a contract between custom house brokers for the handling of an importing business and a division of profits thereunder, which division was to be "on entry and any profits that may accrue through attending to cartage," the item of forwarding charges is not included therein, where there is nothing in the contract contemplating a division of such charge, and a letter passing between the parties stated that "you are to make no charge for forwarding," even though the importer allowed such charge to be made. *Bane v. Dow*..... 631
3. **SAME—TERMINATION OF CONTRACT—CONSTRUCTION BY PARTIES.** Such contract is not terminated where there is nothing to show an intention of the parties as to when it should terminate, and, while construing the contract differently, each of the parties has always recognized it as still in force. *Bane v. Dow*..... 631

JUDGES:

See JUSTICES OF THE PEACE.

Comment on evidence, see CRIMINAL LAW, 6; TRIAL, 1, 2.

JUDGMENT:

Review, see **APPEAL AND ERROR**.

Affirmance on appeal without prejudice, see **CRIMINAL LAW**, 14.

Presumptions as to regularity of, see **EVIDENCE**, 2.

Stay of, on garnisheeing defendant pending replevin suit, see **GARNISHMENT**.

In action to abate house of prostitution under "Red Light Law," see **NUISANCE**, 1.

On pleadings, see **PLEADING**, 5.

1. **JUDGMENT—DEFAULT—VACATION—GROUNDS—PROCEEDING TO COMMENCE ACTION—DELAY.** Under Rem. & Bal. Code, § 220, providing that an action may be commenced either by the service of a summons or filing a complaint, a delay of three years in filing the complaint after commencement of the action by the service of a summons and copy of the complaint, does not deprive the court of jurisdiction to enter a default judgment, or warrant the vacation of the default, where there had been no appearance by the defendant. *First National Bank v. Dudley*..... 376
2. **JUDGMENTS—RES JUDICATA—MATTERS NOT DECIDED.** The filing by a devisee of exceptions to the report of an executor showing that he had appropriated certain income to his own use, upon which no formal judgment was entered, the court approving the report with the intimation that the proper time to raise the objection was on the final accounting, would not constitute *res judicata* in an action by the administratrix *de bonis non* for a conversion of the income. *Denton v. Schneider*..... 506
3. **JUDGMENTS—BAR—DENIAL OF DIVORCE—MATTERS CONCLUDED.** The denial of a divorce being final and conclusive upon all questions which were or might have been litigated, in a subsequent action for a divorce brought by the plaintiff upon the same grounds, the testimony should be limited to the conduct of the defendant subsequent to the entry of the former judgment. *Averbuch v. Averbuch*... 257
4. **JUDGMENT—RES JUDICATA—PLEADING—WAIVER.** Where, in a former action, a divorce on the ground of cruelty was denied the plaintiff, defendant's plea of *res judicata* is not waived by alleging affirmatively that the plaintiff had been having clandestine meetings with one H. and that her affection for him was the sole cause of her leaving home, which was in accordance with the findings in the former trial. *Averbuch v. Averbuch*..... 257
5. **JUDGMENT—FOREIGN JUDGMENT—ACQUIESCENCE—ATTORNEY AND CLIENT—APPEARANCE—AUTHORITY.** Where, in an action against a foreign corporation, the service on its agent was good, and the defendant had notice of the pendency of the action, and that a certain attorney was appearing for it, but did nothing to renounce the appearance or to prevent a threatened default which the attorney

JUDGMENT—CONTINUED.

suffered because of nonpayment of his fees, the appearance was authorized by acquiescence, and the default judgment was valid. *Kline Brothers & Co. v. North Coast Fire Ins. Co.*..... 609

6. **JUDGMENT—ACTIONS—BURDEN OF PROOF.** Where a judgment of a court of general jurisdiction in a foreign state recited an appearance on behalf of the defendant, it is necessary for the defendant to show that the attorney making the appearance did so without authority. *Kline Brothers & Co. v. North Coast Fire Ins. Co.*..... 609

JUDICIAL NOTICE:

In civil actions, see **EVIDENCE**, 1.

JUDICIAL SALES:

See **TRUSTS**.

JURISDICTION:

Appellate jurisdiction, see **APPEAL AND ERROR**, 1, 2.

Of action between foreign corporations, see **CORPORATIONS**, 6.

To grant supersedeas pending appeal from judgment in condemnation proceeding, see **EMINENT DOMAIN**, 11.

To enter default judgment, see **JUDGMENT**, 1.

Justices' court in criminal cases, see **JUSTICES OF THE PEACE**, 1, 2.

To determine sufficiency of appeal, see **PROHIBITION**.

Review of assessment of tax, see **TAXATION**, 6.

Of public service commission, to determine question of discrimination in rates by water company, see **WATERS AND WATER COURSES**, 1.

JURY:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 1, 8, 13.

Disqualification or misconduct ground for new trial, see **CRIMINAL LAW**, 11.

Discharge of, for failure to agree, see **JUSTICES OF THE PEACE**, 1-3.

Instructions in civil action, see **TRIAL**.

JUSTICES OF THE PEACE:

1. **JUSTICES OF THE PEACE—TRIAL—CONTINUANCE—JURISDICTION.** A justice does not lose jurisdiction by failing to adjourn a criminal trial to a day certain, upon discharging a jury that was unable to agree upon a verdict; and may bring the defendant before him on a second warrant. *State ex rel. Adams v. Grimes*..... 14
2. **SAME—JURY TRIAL—DISCHARGE OF JURY—FAILURE TO AGREE.** Although not provided for by statute, it is within the general powers of a justice of the peace to discharge a jury in a criminal case, without a loss of jurisdiction, where the jury is unable to agree after deliberation for a reasonable length of time. *State ex rel. Adams v. Grimes* 14

JUSTICES OF THE PEACE—CONTINUED.

3. **SAME—DELIBERATION BY JURY—REASONABLE TIME.** Deliberation by a jury in justice court for one hour is a reasonable time, authorizing its discharge, where the jury announced its inability to agree, and the justice upon inquiry finds there is no probability that they will agree. *State ex rel. Adams v. Grimes*..... 14
4. **JUSTICES OF THE PEACE—PLEADINGS—AMENDMENTS.** After change of venue to another justice, such justice has power to allow an amendment of the complaint in any particular, allowing a reasonable time to meet the same. *State ex rel. Adams v. Grimes*..... 14

KNOWLEDGE:

Of falsity of representations, see **FRAUD**, 1.

As element of offense of violating local option law, see **INTOXICATING LIQUORS**, 3, 4.

LANDLORD AND TENANT:

Liability of members of fraternity for rent under lease, see **ASSOCIATIONS**.

Leasees not of record as parties defendant, see **EMINENT DOMAIN**, 8.

Conclusiveness of award against lessees with notice, see **EMINENT DOMAIN**, 10, 12.

Lease of terminals condemned for railroad purposes as working reversion of property, see **EMINENT DOMAIN**, 14-16.

Estoppel to question validity of unacknowledged lease, see **FRAUDS, STATUTE OF**, 3.

Ratification of lease made by agent, see **PRINCIPAL AND AGENT**.

1. **LANDLORD AND TENANT—LEASE—TERMINATION—ELECTION TO EXERCISE OPTION—REASONABLE TIME.** Under a written agreement constituting a part of the same transaction as the execution of a lease of premises for the term of five years, whereby the lessor agreed to construct an overhead walk to the building if permit therefor could be obtained from the city within twelve months, and, if not obtained, the lessee should have the option to cancel the lease or amend same as mutually agreeable, where the lessee continues in possession for some months paying the rental stipulated by the lease, after notice from the lessor to forthwith exercise the option for terminating the lease because of failure to obtain the permit, the delay of the lessee for a period of six months to exercise his election is such an unreasonable time as to constitute a waiver of the right. *Pacific Warehouse Co. v. McKenzie-Hunt Paper Co.*..... 489

LARCENY:

See **CRIMINAL LAW**, 1, 8, 14.

1. **LARCENY—SUBJECTS OF LARCENY—OYSTERS.** The legislative enactment declaring certain natural beds of oysters to be state reserve oyster lands is not such a reducing of oysters to actual possession, or a reclaiming of them from their wild state, as to render them subject to larceny. *State v. Johnson*..... 522

LATERAL SUPPORT:

Removal of, see **EMINENT DOMAIN**, 13.

Claim for damages by removal of, see **MUNICIPAL CORPORATIONS**, 17, 18.

LEASES:

See **LANDLORD AND TENANT**.

LEGISLATURE:

Enactment of statutes, see **STATUTES**, 5, 6.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—WORDS LIBELOUS PER SE.** A published statement that the prosecuting witness visited the defendant's printing office and threatened to kill him, that he had been unduly intimate with defendant's wife, and had maintained improper relations with the wife of a man whose name was not disclosed, is libelous *per se*. *State v. Takeuchi*..... 556
2. **LIBEL AND SLANDER — CRIMINAL RESPONSIBILITY — INFORMATION — TRANSLATION OF PUBLICATION.** An indictment or information for criminal libel published in a foreign language must set out the defamatory words verbatim and follow them with a proper translation; but it is not essential that the words shall be identical in translations made by different persons, but is sufficient if there is no difference in the ideas conveyed. *State v. Takeuchi*..... 556
3. **LIBEL AND SLANDER—CRIMINAL PROSECUTION—MALICE—PRESUMPTIONS—STATUTES—CONSTRUCTION.** Where the slander was not justified, it is presumed that the words were maliciously spoken, in a prosecution under Rem. & Bal. Code, § 2433, defining malicious slander impairing the reputation for chastity of a female over twelve years of age, and providing that every such slander shall be deemed malicious unless justified by the fact that the language used is true and fair and spoken with good motives. *State v. Paysse*..... 603
4. **SAME—CRIMINAL PROSECUTION—EVIDENCE — CORROBORATION — NECESSITY—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 2434, providing that a conviction for slander of a woman impairing her reputation for chastity cannot be had upon the testimony of the woman slandered unsupported by other evidence, corroboration is only necessary of the facts constituting the gravamen of the offense, so that the testimony of the prosecutrix tending to show that she was entitled to the protection of the statute need not be corroborated. *State v. Paysse*..... 603
5. **SAME—EVIDENCE—INJURY.** In a prosecution for the publication in the Japanese language of an article libelous *per se*, where the prosecuting witness testified that his business credit was injured by reason of the loss of Japanese custom, evidence on the part of

LIBEL AND SLANDER—CONTINUED.

defendant showing such injury was occasioned by loss of credit with American dealers is inadmissible, when it was not shown that such dealers could have read the article in the Japanese language. *State v. Takeuchi* 556

LICENSES:

See **HAWKERS AND PEDDLERS.**

To practice medicine, see **PHYSICIANS AND SURGEONS.**

LIENS:

See **MECHANICS' LIENS.**

Assessment lien as incumbrance on property, see **COVENANTS.**

LIMITATION:

Cost of public improvement, see **MUNICIPAL CORPORATIONS, 4.**

LOCAL OPTION:

See **INTOXICATING LIQUORS.**

LOGS AND LOGGING:

Splash dam as dangerous agency requiring notice of release of waters, see **NEGLIGENCE, 4.**

Construction of contract for sale of logs, see **SALES, 1, 2.**

MALFEASANCE:

Of officers in office ground for recall, see **MUNICIPAL CORPORATIONS, 2.**

MALICE:

Presumptions as to, see **LIBEL AND SLANDER, 3.**

MANDAMUS:

1. **MANDAMUS—PROCEEDINGS—DEFAULT.** Under Rem. & Bal. Code. § 1017, a writ of mandamus cannot be granted by default, but the case must be heard by the court whether the adverse party appears or not. *State ex rel. Goss v. Metaline Falls Light & Water Co.*... 652

MANSLAUGHTER:

Charging offense, see **INDICTMENT AND INFORMATION.**

MARRIAGE:

Seduction under promise of marriage, see **SEDUCTION.**

1. **MARRIAGE—VALIDITY—ANNULMENT—INFANTS—AGE OF CONSENT—STATUTES—CONSTRUCTION.** The common law age of consent to marry, of 14 years for males and 12 for females, is not changed by Rem. & Bal. Code, § 7150, providing that marriage is a civil contract that may be entered into by males of the age of 18, and § 7162, authorizing the annulment of a marriage if either party was incapable of consenting thereto for want of legal age, and § 7164, providing for licenses to marry when under age upon the written consent of the

MARRIAGE—CONTINUED.

parents, if the female be over fifteen years of age; since the statute permitting marriage was only cumulative of the common law and nowhere prohibits the marriage of minors, or changes the common law rule, and since the regulations as to the issuance of licenses do not affect the marriage status, and the requirement of parental consent recognizes that infants are capable of giving their own consent, under common law rules. *Cushman v. Cushman*..... 615

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Liens for labor and materials, see MECHANICS' LIENS.

1. **MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—STATUTES—CONSTRUCTION.** A corporation is engaged in an extra hazardous employment, within the purview of the industrial insurance act, 3 Rem. & Bal. Code, § 6604-1 *et seq.*, where, in connection with its main business of conducting a large department store, it maintains a work shop for repairs where power-driven machinery is employed and manual labor exercised, over which place it has control, in view of Id., § 6604-2, enumerating, among the hazards embraced, workshops where machinery is used, and § 6604-3, defining workshops as rooms or places wherein power-driven machinery is employed and manual labor exercised . . . in or incidental to making, repairing, or adapting any article, over which place the employer has the right of access or control. *Wendt v. Industrial Insurance Commission*..... 111
2. **SAME—EXTRA HAZARDOUS EMPLOYMENT—CARPENTERS—STATUTES—CONSTRUCTION.** A carpenter employed by a large department store in making repairs, alterations and fittings and doing carpenter work about the store, who was killed while attempting to turn on the electric power in the workshop where power-driven machinery was employed, is a "workman" within the protection of the industrial insurance act, where his employer was, in one of its departments, through the operation and control of a workshop employing power-driven machinery, engaged in an extra hazardous employment within the definition of 3 Rem. & Bal. Code, §§ 6604-2 and 6604-3; in view of Id., § 6604-4, including in the particular classes of industry covered by the act, class 5, under construction work, "carpenter work not otherwise specified," and class 29, under factories using power-driven machinery "working in wood not otherwise specified;" and in view of the further provision that, if an employer, besides employing workmen in extra hazardous employments, shall also employ workmen in other employments, the act shall apply only to the extra hazardous departments and employments of workmen employed therein. *Wendt v. Industrial Insurance Commission*.. 111

MASTER AND SERVANT—CONTINUED.

3. MASTER AND SERVANT—RELATION—WORKMEN'S COMPENSATION ACT—"WORKMAN." The relation of master and servant does not exist between father and son, within the meaning of the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-8, defining a "workman" as every person engaged in the employment of an employer carrying on specified industries, and Id., § 6604-4 providing that in computing the payroll, there shall be included the entire compensation of every workman, whether payable in the form of salary, wage, piece work, . . . money, board or otherwise," where it appears that a son, thirteen years of age, who desired to go to work in his father's shingle mill as a packer, was allowed to go to work driving shingle bolts on a creek on the promise that later he could have the packer's job, there being nothing said about compensation; since, in the case of father and minor child, there must be clear proof of a contractual relation. *Hillestad v. Industrial Insurance Commission*..... 426
4. SAME—RELATION—LAWFUL EMPLOYMENT—WORKMEN'S COMPENSATION. To obtain compensation under Rem. & Bal. Code, § 6570 of the workmen's compensation act, prohibiting the employment of persons under fourteen years of age, without permission of the superior court, it is incumbent upon the claimant to show that a child under fourteen years of age was employed lawfully; and, in the absence of proof of permission, violation of the law will be presumed. *Hillestad v. Industrial Insurance Commission* 426
5. SAME—RELATION—EMPLOYMENT—WORKMEN'S COMPENSATION ACT. Under Rem. & Bal. Code, § 6570, providing that no person under fourteen years of age shall be "hired out to labor in any factory, mill, workshop, or store," the statute is violated and no recovery can be had under the workmen's compensation act, where a boy of thirteen was drowned in a creek about eighty rods from a shingle mill, while engaged in driving shingle bolts to the mill; since the creek was in sense a part of the machinery of the mill, as a conveyor, and the boy was engaged "in the mill" to the same extent that he would have been if putting bolts on the slip of the mill. *Hillestad v. Industrial Insurance Commission*..... 426
6. SAME—WORKMEN'S COMPENSATION—PERSONS PROTECTED—SCOPE OF EMPLOYMENT. A carpenter employed in a department store having a repair shop where power-driven machinery is employed, is acting within the scope of his employment, and so is within the purview of the industrial insurance law, where he was killed while turning on the electric switch to start a grindstone for the purpose of sharpening a chisel for use in his work. *Wendt v. Industrial Insurance Commission* 111
7. MASTER AND SERVANT—WORKMEN'S COMPENSATION—PREMIUMS PAYABLE TO STATE—CLASSIFICATION—RATE—STATUTES—CONSTRUCTION. Under 3 Rem. & Bal. Code, § 6604-4, of the workmen's compensation act, classifying "construction work" and requiring payment into the

MASTER AND SERVANT—CONTINUED.

state treasury of a premium of six and one-half per cent of the payroll for construction work on "tunnels," with various other rates for "bridges," "carpenter work," etc. and five per cent for "steam railroads," and *Id.*, § 6604-4, subd. 3, providing that if a single establishment of work comprises several occupations listed in different risks, the premium shall be computed according to the payroll of each occupation, if clearly separable, a railroad engaged in the construction of a tunnel for use on its main line must pay the premium listed for "tunnel" construction, where the payroll therefor was clearly separable from its payrolls for other construction work. *State v. Chicago, Milwaukee & Puget Sound R. Co.*..... 435

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERMANENT PARTIAL DISABILITY—STATUTES—CONSTRUCTION. A workman injured while engaged in a hazardous occupation is not entitled to an award by the industrial insurance commission as for "permanent total disability," but can recover for "permanent partial disability," where his injuries resulted in the loss of portions of his fingers, subd. (b) of the act, 3 Rem. & Bal. Code, § 6604-5, expressly defining permanent total disability as the loss of both legs or both arms, one leg or one arm, total loss of eyesight, etc., and subd. (f) defining permanent partial disability as the loss of one foot, one leg, one hand . . . "one or more fingers," etc. *Sinnes v. Daggett*.... 673
9. SAME—AWARD FOR INJURIES—DISCRETION OF COMMISSIONERS—REVIEW BY COURT. Under subd. (f) of § 5 of the workmen's compensation act, 3 Rem. & Bal. Code, § 6604-5, defining permanent partial disability of an employee engaged in a hazardous occupation, and prescribing that the award be paid in a lump sum, but never to exceed \$1,500, to be decided by the department, and § 20 of the act (*Id.*, § 6604-20) providing for a review of decisions of the department, so far as such decision rests upon questions of fact, etc., the amount of the award is within the discretion of the department, and will not be reviewed, in the absence of capricious or arbitrary action in fixing the same, especially where the amount allowed the employee was \$1,200. *Sinnes v. Daggett*..... 673
10. MASTER AND SERVANT—FEDERAL EMPLOYEE'S LIABILITY ACT—SCOPE OF EMPLOYMENT. A recovery cannot be had under the Federal Employer's Liability Act for the wrongful death of an employee while on the pilot of an engine, by merely showing the injury and that the employee was at the time engaged in interstate commerce, nor in the absence of negligence occasioning the injury; and the duty to furnish the servant a safe place in which to work not extending to places where he is not required or expected to be in performing his duties, it is incumbent upon the plaintiff to show that the servant was, at the time of the injury, engaged in some act incidental to his employment. *Hobbs v. Great Northern R. Co.*..... 678

MASTER AND SERVANT—CONTINUED.

11. MASTER AND SERVANT—EMPLOYMENT—DISCHARGE—CONDITIONS—QUESTION FOR JURY. A contract of employment providing for its termination for "any good reason," implies that an issue on that subject is to be determined by a court or jury. *Caldwell v. Klyce*... 469
12. MASTER AND SERVANT—NEGLIGENCE—QUESTION FOR JURY. Whether a teamster's helper was guilty of negligence in releasing his hold on the end of a steel shaft without notifying the teamster, is a question for the jury, where there was room for a reasonable difference of opinion. *Potts v. Fortune*..... 302
13. MASTER AND SERVANT—FELLOW SERVANTS—COMMON EMPLOYMENT. A teamster and his helper are fellow servants, where they were engaged in transferring from another wagon to the plaintiff's wagon a heavy steel shaft, which fell and injured plaintiff. *Potts v. Fortune* 302
14. SAME—EMPLOYMENT OF INCOMPETENT FELLOW SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A master is not negligent in employing a teamster's helper, where, before hiring him, he inquired of his former employer as to his qualifications and was assured that he was a good man; the employment being simple. *Potts v. Fortune* 302
15. SAME—NOTICE OF INCOMPETENCE. A master is not negligent in retaining in his employ a teamster's helper, engaged in simple work, who was recommended by his former employer, merely on account of notice that he was quick and hasty in his actions, and where, on complaint made, no promise was given that he would be discharged. *Potts v. Fortune* 302
16. MASTER AND SERVANT—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. A verdict cannot be sustained for wrongful death of a minor employed as a hostler's helper, who was killed while on the pilot of an engine during a collision, where the testimony of plaintiff's witnesses as to the reason for his presence there was purely speculative, and it was clearly established that he was not in the performance of his duties, and was violating a rule forbidding employees to ride on engine pilots. *Hobbs v. Great Northern R. Co.*..... 678
17. MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—CHILD AS SERVANT OF PARENTS—DRIVING AUTOMOBILE. A community, consisting of husband and wife, the owner of an automobile used for the pleasure of their family and the business of the community, is liable to third persons for injuries sustained through the negligent driving of a daughter, using the car with the consent of the parents, whether it was driven for pleasure or business. *Switzer v. Sherwood*..... 19

MEASURE OF DAMAGES:

See DAMAGES, 3-5.

Uncertainty of as ground for action to restrain breach of contract, see INJUNCTION.

For breach of warranty, see SALES, 7.

MECHANICS' LIENS:

1. **MECHANICS' LIENS—PROPERTY SUBJECT—ARCHITECTS—FAILURE TO BUILD.** An architect, preparing plans for a building which was not constructed, cannot claim a lien upon the premises. *Lipscomb v. Exchange National Bank of Spokane*..... 296
2. **MECHANICS' LIENS—PRIORITY—PRIOR MORTGAGE.** Under Rem. & Bal. Code, § 1130, the lien of a prior mortgage is inferior to the claims for mechanics' liens. *Lipscomb v. Exchange National Bank of Spokane* 296
3. **MECHANICS' LIENS—ACTIONS—PAYMENT.** In an action to foreclose mechanics' liens, where an architect and another had agreed to take for their services a certain proportion in cash and the balance in interest bearing obligations issued by the corporation on the faith of the enterprise, they cannot assert nonpayment through the fault of the promoters, when the enterprise failed because of its impracticability, and not on account of the fraud or neglect of the promoters; as they must be held to have assumed the risk of such failure. *Lipscomb v. Exchange National Bank of Spokane*..... 296

MEDICAL TREATMENT:

As element of damages, see DAMAGES, 2.

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF, 1.

MENTAL SUFFERING:

As ground for damages for delay in transmission of message, see TELEGRAPHS AND TELEPHONES.

MISREPRESENTATION:

See FRAUD.

In sale of realty, see VENDOR AND PURCHASER, 1, 2.

MISTAKE:

Omissions in abstract of title, see ABSTRACTS OF TITLE.

MODIFICATION:

Of decree in divorce, see DIVORCE, 3, 6.

MONEY:

Right to select and retain in lieu of "other property," see EXEMPTIONS.

MORTGAGES:

- Priorities between mortgages and mechanics' liens, see **MECHANICS' LIENS**, 2.
- By purchasers of trust estate, see **TRUSTS**.

MUNICIPAL CORPORATIONS:

- Lien of assessment for benefits from improvement as incumbrance on property conveyed, see **COVENANTS**.
- Acquisition of property by condemnation, see **EMINENT DOMAIN**, 1-7, 9, 11, 13.
- Sunday closing of theaters, see **SUNDAY**.
- 1. **MUNICIPAL CORPORATIONS—ORDINANCES—GOOD FAITH.** The courts cannot inquire into the motives impelling the passage of an ordinance, reasonable on its face, or question its reasonableness from the fact that it was passed by a majority of the council over the mayor's veto. *In re Ferguson*..... 102
- 2. **MUNICIPAL CORPORATIONS — OFFICERS — RECALL — GROUNDS—"MALFEASANCE"—TRADING VOTES IN COUNCIL.** It is "malfeasance" in office, within the meaning of 3 Rem. & Bal. Code, § 4940-1 *et seq.*, authorizing the recall of city officers, for councilmen to make an agreement for the trading of votes whereby each yielded his personal judgment in voting on certain appointments and matters in consideration of the promise of votes on other matters of special interest to him. *Pybus v. Smith*..... 65
- 3. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—PROCEEDINGS—NOTICE — STATUTE—APPLICATION.** Provisions of a city charter of the first class with reference to the publication of notice of proposed improvements do not apply to proceedings under 3 Rem. & Bal. Code, § 7892-1 *et seq.*, in view of *Id.*, § 7892-67 making the act applicable to all cities, and § 7892-71 providing that the act shall supersede the provisions of the charter of any city of the first class inconsistent therewith. *Beach v. Bellingham*..... 287
- 4. **SAME — ASSESSMENTS — LIMITATIONS — SEPARATE IMPROVEMENT.** Where a resolution and ordinance for the clearing, grading and curbing of a certain street were within the statute as to the maximum cost, they are not invalidated by the adoption, on the same day, of a resolution and ordinance for paving the same street, the combined cost of the two improvements exceeding the maximum cost allowed by law, where the later improvement was held illegal and the ordinance therefor subsequently repealed. *Beach v. Bellingham* 287
- 5. **MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — EXCESSIVENESS.** An assessment for benefits for a street improvement for the purpose of eliminating excessive grades between the termini of the improvement, is shown to be excessive and arbitrary, where it appears that most of the cost was assessed against the property of one party, who receives the principal part of the jury's award for

MUNICIPAL CORPORATIONS—CONTINUED.

damages for property taken and damaged, a cut in front of the property increased the grades of cross streets and alleys, which were already excessive, and the assessment exceeded the value of the property put upon it by the assessor for the purposes of general taxation and was more than two-thirds of the owner's estimates of the value, and grossly exceeds the assessments placed upon adjacent and contiguous property. *In re Fifth Avenue West*..... 464

6. SAME—NEGLIGENCE OF CITY—EVIDENCE—SUFFICIENCY. Negligence on the part of a city is not shown in allowing obstructions in part of a street that was in the course of repair and not open for travel, where the defects were open and apparent and a way was left open which was reasonably safe. *Chase v. Seattle*..... 61
7. SAME—NOTICE OF DEFECT. Where, in improving a street, earth had been filled around a catch basin to the common level the day before, and it rained on the night preceding the accident, causing the earth to settle, so that the defect had existed but a few hours, the city is not liable for injuries thereby sustained by a traveler, in the absence of actual notice of the defect; since there was no constructive notice. *Chase v. Seattle*..... 61
8. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE PER SE. It is negligence *per se* to drive an automobile on a city street at a speed in excess of the rate fixed by a city ordinance and the state law. *Anderson v. Kinnear*..... 638
9. MUNICIPAL CORPORATIONS—STREETS—COLLISION AT CROSSING—NEGLIGENT DRIVING OF AUTOMOBILE. The driver of an automobile, who struck a pedestrian upon a city crossing, while exceeding the speed limit and without sounding any warning, in violation of a city ordinance, is guilty of negligence rendering him liable for the injuries sustained. *Franey v. Seattle Taxicab Co.*..... 396
10. MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION—DEFENSES—FAILURE TO OBTAIN LICENSE. The operation of a motorcycle without first having obtained a license, in violation of Rem. & Bal. Code, §§ 5562-5566, does not bar an action to recover for personal injuries sustained in a collision with an automobile, as there was no causal connection between the acts. *Switzer v. Sherwood*..... 19
11. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE. The driver of a team is guilty of contributory negligence, as a matter of law, in making a turn so short that the rear wheel of his wagon fell into an excavation for a sewer, where he had just been over the same route and made the turn in safety, the obstructions were in plain view, it was broad daylight, and that portion of the road was closed to travel. *Chase v. Seattle*..... 61
12. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIEN-

MUNICIPAL CORPORATIONS—CONTINUED.

- cy. In an action for personal injuries sustained through a collision with an automobile, driven at an excessive rate of speed and in plain violation of law, the refusal of the court to grant a nonsuit on the ground of the contributory negligence of the plaintiff was warranted, where it appeared that the plaintiff, as soon as he saw the defendant's automobile, shut off the power of his motorcycle and entered upon the crossing at a slow rate of speed, and finally stopped his motorcycle, but was nevertheless run down and injured. *Anderson v. Kinnear* 638
13. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a boy, who got off the end of a wagon at a city crossing and proceeded to cross the street without looking for approaching automobiles, was guilty of contributory negligence, precluding a recovery for injuries sustained when struck by an automobile going at an excessive speed, is a question for the jury, where it appears that he was on the crossing where he had a right to be, and had gone some distance after getting off the wagon, so that he was in plain view of the automobile which was following the wagon, as he had a right to assume that the automobile would not exceed the speed limit and would pass him without running him down. *Francy v. Seattle Taxicab Co.*..... 396
14. MUNICIPAL CORPORATIONS — BONDS—INDEBTEDNESS — LIMITATIONS—“LIGHT” PLANT. Bonds to be issued by a city for enlarging its municipal “lighting and power” plant and system and furnishing electricity for light, power, and heat, are to be classified as “light bonds,” within the limitation of Const., art. 8, § 6, authorizing any city to become indebted to the extent of a second five per centum for supplying the city with water, “artificial light” and sewers, and not as “light and power” bonds, where from the beginning the city pursued that policy and its electric plant was used primarily for lighting the streets and furnishing lights to the inhabitants, its hydro-electric plant could be operated twenty-four hours a day at practically the same expense as for shorter hours, the steam plant was to be auxiliary, so as to have power available for lighting in cases of emergency, and, by utilizing the surplus energy for power and heat, the cost for lights was materially reduced. *Chandler v. Seattle* 154
15. SAME—GRANT OF POWER—AUTHORITY OF CITY. A grant of power to provide for lighting a city authorizes the erection and maintenance of a plant for lighting the streets, and also, in connection therewith, supplying electric light to the inhabitants of the city in their private homes. *Chandler v. Seattle*..... 154
16. SAME—BONDS—UNRELATED OBJECTS. In such case, the auxiliary steam power plant and the enlargement of the hydro-electric plant did not combine unrelated objects. *Chandler v. Seattle*..... 154

MUNICIPAL CORPORATIONS—CONTINUED.

17. **MUNICIPAL CORPORATIONS—CLAIMS — DAMAGES — REMOVAL OF LATERAL SUPPORT—NECESSITY OF CLAIMS.** Under Seattle city charter, art. 4, § 29, requiring all claims for damages against the city to be filed within thirty days, a claim for damages by the removal of lateral support is a prerequisite to the action, where the city had condemned the right to make the change in grade and to take land sufficient for a one-to-one slope, and paid the compensation, and the damages resulted from the inadequacies of the plan to protect the remaining property from sliding. *Jorguson v. Seattle*..... 126
18. **SAME—CLAIMS FOR CONTINUING DAMAGES.** A claim for continuing damages to abutting property, by reason of a progressive slide caused by the city's removal of lateral support, is within a charter provision requiring "all claims" for damages against the city to be filed within thirty days after such claim accrues; and Rem. & Bal. Code, §§ 7995-7997, making the filing of such claims in the manner required by the city charter a mandatory condition precedent to action, no recovery can be had for damages accruing more than thirty days prior to the filing of the claim. *Jorguson v. Seattle*.. 126
19. **SAME—CONTINUING DAMAGES — FUTURE DAMAGES — INSTRUCTIONS.** A charter provision requiring a claim for all damages against a city to be filed within thirty days after the action accrues, does not operate as a statute of limitations as to continuing damages, and permits of the recovery of future damages, to the day of trial, but the jury are properly instructed that there can be no recovery for damages accruing more than thirty days prior to the filing of the notice. *Jorguson v. Seattle*..... 126
20. **MUNICIPAL CORPORATIONS — CLAIMS — REQUISITES — RESIDENCE OF CLAIMANT.** Rem. & Bal. Code, § 7995, requiring claims for damages against a city of the first class to be filed in compliance with valid charter provisions, and that the claim shall contain a statement of the actual residence of the claimant "at the date of presenting and filing the claims," and also for six months prior to the accrual thereof, is substantially complied with by a claim stating the residence for a year "last past" at the time of the verification of the claim, which was three days before it was filed; and is sufficient to admit proof of the same residence at the time of the filing. *Decker v. Seattle* 137
21. **MUNICIPAL CORPORATIONS — CLAIMS — REQUISITES — RESIDENCE OF CLAIMANTS.** A claim for damages against the city of Seattle, a city of the first class, stating the residence of the claimants by street and number, without stating the name of the city, the venue of the jurat of the claim being laid in King county, sufficiently complies with Rem. & Bal. Code, § 7995, requiring the claim to state the actual residence of the claimants "by street and number," in the absence of a showing that the failure to name the city, county and state was misleading. *Bane v. Seattle*..... 141

MURDER:

See HOMICIDE.

Charging offense, see INDICTMENT AND INFORMATION.

NAMES:

Of corporations, similarity, see CORPORATIONS, 1.

Identity of accused, presumption from identity of names, see CRIMINAL LAW, 2.

1. NAMES—ASSUMED NAMES—CERTIFICATES—SUFFICIENCY—STATUTES—CONSTRUCTION. A certificate as to the assumed name under which plaintiff was doing business complies with Rem. & Bal. Code, § 8369, requiring it to set forth the post office address of the parties interested, where it recites that the plaintiff is engaged in and conducting a general retailing business at Metaline Falls, Pend Oreille county, state of Washington. *Remly v. Swanson*..... 449
2. SAME—ASSUMED NAME—CERTIFICATE—SUFFICIENCY. A certificate as to the assumed name under which a party was doing business need not give the name of her husband as a party interested, under Rem. & Bal. Code, § 8369, when she was the owner of the business and her husband was merely a manager. *Remly v. Swanson*,... 449

NAVIGABLE WATERS:

1. NAVIGABLE WATERS—LANDS UNDER WATER—CONVEYANCES—CONSTRUCTION. After the title to the bed of a tidal stream has passed from the state into private ownership, a conveyance by an upland proprietor, describing the land as bounded by such stream, and making no reservation of the portion covered by water, passes title to the grantor's interests as far as the grantor owns under the waters of such stream. *Wardell v. Commercial Waterway District No. 1* 495

NECESSITY:

For filing abstract of record on appeal, see APPEAL AND ERROR, 11, 12.

For taking land for public use, see EMINENT DOMAIN, 2-4.

For pleading estoppel, see ESTOPPEL, 3.

For employment of special counsel by guardian to defend proceedings for removal and for accounting, see INSANE PERSONS, 2.

Of claim for damages by removal of lateral support, see MUNICIPAL CORPORATIONS, 17.

Of proving allegations of complaint, after admissions in pleadings, see PLEADING, 3.

NEGLIGENCE:

In making abstract of title, see ABSTRACTS OF TITLE.

Of owner of vicious bull, see ANIMALS.

Of bailee as causing loss of goods, see BAILMENT.

Free pass as exempting carrier from negligence, see CARRIERS, 9, 10.

Of carrier in starting car, see CARRIERS, 11, 12.

Measure of damages, see DAMAGES, 3-5.

NEGLIGENCE—CONTINUED.

Cause of explosion, see **EXPLOSIVES**.

Liability of married woman for negligence of child in driving automobile, see **HUSBAND AND WIFE**, 1.

Of employers, see **MASTER AND SERVANT**.

Of child as binding community for injury to third person through collision with automobile, see **MASTER AND SERVANT**, 17.

Of city in allowing obstruction in street, see **MUNICIPAL CORPORATIONS**, 6.

Of driver of automobile on city street, see **MUNICIPAL CORPORATIONS**, 8, 9.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 11, 13.

Of person injured by operation of railroad, see **RAILROADS**, 2.

Delay in transmission of message, see **TELEGRAPHS AND TELEPHONES**.

Of county in maintenance of public dock, see **WHAEVES**.

1. **NEGLIGENCE—FIRES—LIABILITY—FAILURE TO SECURE PERMIT—STATUTES—APPLICATION.** 3 Rem. & Bal. Code, § 5277-8, providing that no one shall burn any forest material within any county in which there is a fire warden or ranger, during specified months, without first having obtained a written permission from the warden or ranger, has no application where the fire warden sent rangers to personally superintend the burning and take charge thereof; hence the setting of a fire, pursuant to the directions of rangers in charge of the burn, does not render the party liable as for a fire set without the written permit, as provided by the statute requiring permits, it not being customary to issue permits in such cases. *Waldy v. Preston Mill Co.* 25
2. **NEGLIGENCE—FIRES—LIABILITY.** Where forest rangers in charge of a burn arranged for the starting of a fire by defendant upon a given signal, and defendant mistook or misunderstood the signal and started a fire too soon, thereby destroying plaintiff's property, the defendant is not liable unless it failed to act as a reasonably prudent person would have acted in the exercise of reasonable care in starting the fire. *Waldy v. Preston Mill Co.*..... 25
3. **NEGLIGENCE—DANGEROUS PREMISES—PLACES ATTRACTIVE TO CHILD.** A county is charged with notice and bound to anticipate that a public dock at the termination of a county road is a place attractive to children and might be used by them for recreation, especially where the county allowed a confectionery stand upon the dock. *Gregg v. King County*..... 196
4. **NEGLIGENCE—DANGEROUS AGENCIES—SPLASH DAM—WARNING—EVIDENCE—SUFFICIENCY.** Where the release of a splash dam sent the water down the stream at the rate of eight or nine miles per hour, and created a rise at a dry ford of about one foot per hour for four hours, the dam is not such a dangerous agency as to require warning to one who might be in or near the river at the ford, especially if such person had knowledge of the approximate time

NEGLIGENCE—CONTINUED.

and character of the splashes; hence it was not actionable negligence to fail to give warning of a splash. *Berryman v. East Hoquiam Boom & Logging Co.*..... 364

5. **NEGLIGENCE—DANGEROUS PREMISES—PUBLIC DOCK—TRESPASSERS—CHILDREN.** A child of tender years (six), accompanying an older brother who was sent on an errand to a public dock to meet a steamer, is not a trespasser in going upon the dock, which was at the termination of a county road. *Gregg v. King County*..... 196
6. **SAME—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS.** In the absence of evidence to the contrary, a child of six or seven years of age is presumed to be incapable of contributory negligence. *Gregg v. King County* 196
7. **NEGLIGENCE—PERSONAL INJURIES—ACTION BY CHILD—CONTRIBUTORY NEGLIGENCE OF PARENT.** In an action by a minor child of tender years to recover for his own personal injuries, the contributory negligence of his parents is no defense. *Gregg v. King County*.. 196

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

NETS:

Use of in fresh water above tide water as nuisance, see **FISH.**

NEWLY DISCOVERED EVIDENCE:

Reopening case for, see **CRIMINAL LAW, 7.**

Ground for new trial in civil actions, see **NEW TRIAL, 6.**

NEW TRIAL:

Appealability of order granting new trial, see **APPEAL AND ERROR, 1.**

Review of rulings on, see **APPEAL AND ERROR, 15, 16.**

In criminal prosecutions, see **CRIMINAL LAW, 11.**

1. **NEW TRIAL—MISCONDUCT OF PARTY.** A new trial will not be granted for misconduct of a party in charging a witness with giving false testimony, where the showing was not sufficient. *Agnew v. Hackett* 236
2. **NEW TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT.** A new trial should not be granted for misconduct of counsel in argument to the jury, merely for making statements and drawing deductions not fully warranted by the record, it being presumed, when there was no grave abuse of privilege, that the jury determined the case on the evidence. *Neitzel v. Spokane International R. Co.*..... 30
3. **NEW TRIAL—MISCONDUCT OF COUNSEL—OFFERS OF PROOF.** Persistent offers of proof of evidence that had been previously excluded is not such misconduct of counsel as to require a new trial, where it cannot be said that counsel acted in bad faith with intent to place inadmissible evidence before the jury, and any prejudicial effect was removed by the court's instructions during the course of the

NEW TRIAL—CONTINUED.

- trial requiring the jury to disregard all such excluded evidence.
Munson v. Johnson 628
4. NEW TRIAL—GROUNDS—INADEQUATE DAMAGES—DISCRETION. It is not an abuse of discretion to grant a new trial on account of inadequate damages, in an action for the death of a minor child, where the jury awarded plaintiff but fifteen dollars, the amount paid out for burial expenses, and there was evidence of pecuniary loss.
Bernard v. North Yakima..... 472
5. NEW TRIAL—CONDITIONS—INCREASING AMOUNT. The grant of a new trial on account of inadequate damages may be made conditioned on the appellant's refusal to consent to a judgment in a larger sum. *Bernard v. North Yakima*..... 472
6. NEW TRIAL—SURPRISE—NEWLY DISCOVERED EVIDENCE. A new trial on the ground of surprise and newly discovered evidence in a criminal trial cannot be claimed where it appears that, on a prosecution three years previously, while represented by the same attorney, the alleged newly discovered evidence was produced and used by the defendant upon a similar issue, which he was informed by the information would be again used against him on the trial; since no reasonable diligence was used to produce the evidence at the trial.
State v. Miller 75

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 8.
 To purchaser of note of outstanding equities, see **BILLS AND NOTES**, 2.
 To master of incompetence of servant, see **MASTER AND SERVANT**, 15.
 Proposed public improvement, see **MUNICIPAL CORPORATIONS**, 3.
 Of defects in streets, see **MUNICIPAL CORPORATIONS**, 7.
 Claim for damages, see **MUNICIPAL CORPORATIONS**, 17-21.
 Of dangerous nature of premises, see **NEGLIGENCE**, 3.
 Purchaser of real property, see **VENDOR AND PURCHASER**, 3.

NUISANCE:

Use of nets above tide water, see **FISH**.
 Tax against property on abatement of disorderly house under "Red Light Law," see **TAXATION**, 1.

1. NUISANCES—DISORDERLY HOUSE—ACTIONS TO ABATE—JUDGMENT—PENALTY—SALE OF PROPERTY. In providing for the abatement of houses of prostitution, under the "Red Light Law," it was competent for the legislature to require the building to be closed for a period of six months, and to order the personal property used to be sold and applied to the payment of costs. *State ex rel. Kern v. Jerome* 261

NUISANCE—CONTINUED.

2. **SAME—ACTIONS TO ABATE—PROCEEDINGS—TAX—LIABILITY ON RELEASE BY BOND.** The giving of a bond to abate a nuisance under the "Red Light Law" does not relieve the property from the tax of \$300 assessed against the property, in view of 3 Rem. & Bal. Code, § 946-7, which provides that the court may cancel the order of abatement and deliver the premises to the owners upon the filing of a bond to abate the nuisance and prevent its renewal for a period of one year, provided that the release of the property shall not release it from any judgment, lien, penalty or liability. *State ex rel. Kern v. Jerome* 261
3. **NUISANCES — DISORDERLY HOUSE—ACTION TO ABATE — DEFENSES — ABATEMENT BY PARTIES—GOOD FAITH—EVIDENCE—SUFFICIENCY.** In a prosecution under the "Red Light Law," 3 Rem. & Bal. Code, § 946-1 *et seq.*, a permanent abandonment, in good faith, of the use of a house for the purposes of prostitution, is not shown so as to warrant the court in denying a permanent injunction against the premises, where the facts merely show a hasty change in existing conditions after the prosecution was instituted, coupled with a declaration by the parties not to again engage in or permit the business at the place in question. *State ex rel. Kern v. Jerome*..... 261

OATH:

Evidence of oath being administered to witness, see **PERJURY**, 1.

OBJECTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 3.
 To evidence for purpose of review, see **CRIMINAL LAW**, 9.
 To condemnation proceeding, waiver of, see **EMINENT DOMAIN**, 7.

OBSTRUCTIONS:

In city street, see **MUNICIPAL CORPORATIONS**, 6, 7, 11.

OFFICERS:

Municipal officers, see **MUNICIPAL CORPORATIONS**, 2.

OPINIONS:

Of witness as evidence, see **WITNESSES**, 4.

OPTION:

To terminate lease, time of exercise, see **LANDLORD AND TENANT**.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**.

ORDERS:

Review of, see **APPEAL AND ERROR**, 1.
 Of public service commission fixing rates, see **CARRIERS**, 6.
 Interlocutory orders, power of correction, see **COURTS**.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1, 4.

OWNERSHIP:

By railroad of stock in competing line, who may question, see RAILROADS, 1.

OYSTERS:

Unlawful taking from state reserve lands, see CRIMINAL LAW, 14, 16.
As subject to larceny, see LARCENY.

PARENT AND CHILD:

Custody and support of children on divorce, see DIVORCE, 5, 6.
Recovery under industrial insurance act for death of minor employee, see MASTER AND SERVANT, 3-5.
Liability of community for injury to third person through negligent operation of automobile by child, see MASTER AND SERVANT, 17.
Negligence of parent imputable to child, see NEGLIGENCE, 7.

PARKS:

Condemnation of land for public park, see EMINENT DOMAIN, 1-5.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PARTICULARS:

Bill of, see PLEADING, 1.

PARTIES:

Entitled to maintain action to prevent abandonment of line by carrier, see CARRIERS, 3.
Rights and liabilities as to costs, see COSTS.
Condemnation proceedings, see EMINENT DOMAIN, 8, 10.
Concluded by award in condemnation, see EMINENT DOMAIN, 10, 12.
Entitled to claim estoppel, see ESTOPPEL, 2.
Persons who may marry, see MARRIAGE.
Within protection of industrial insurance act, see MASTER AND SERVANT, 2-6.
Persons entitled to mechanics' lien, see MECHANICS' LIENS, 1.
Misconduct of as ground for new trial, see NEW TRIAL, 1.
Entitled to question ownership of stock in competing line, see RAILROADS, 1.
Construction of contract by parties, see SALES, 2.

PARTNERSHIP:

See ASSOCIATIONS.

1. **PARTNERSHIP—ACCOUNTING BETWEEN PARTNERS — ADVANCES — REPAYMENT.** Where partners had agreed to own a certain share in a mine, share and share alike, and one of them gave his note in payment therefor, upon an accounting, one-half of the sum, with interest, should be charged to the other partner, and credited to the maker of the note. *Kleesattel v. Orr*..... 191

PASSAGE:

Of city ordinance, see MUNICIPAL CORPORATIONS, 1.

PASSENGERS:

Carriage of, see CARRIERS, 9-12.

PASSES:

Use of free pass by employee, see CARRIERS, 9, 12.

PAWNBROKERS:

Validity of contract of pledge made in violation of statute, see CONTRACTS.

PAYMENT:

See MECHANICS' LIENS, 3.

Of filing fee on appeal, see APPEAL AND ERROR, 7.

Repayment of advance by partner, see PARTNERSHIP.

PEDDLERS:

See HAWKERS AND PEDDLERS.

PENALTY:

On abatement of nuisance under "Red Light Law," see NUISANCE, 1.

PERFORMANCE:

Failure of broker to perform contract for commissions, see BROKERS.

Part performance as affecting operation of statute, see FRAUDS, STATUTE OF, 3.

Of contract of sale, see SALES, 6.

PERJURY:

1. **PERJURY—OATH—EVIDENCE.** In a prosecution for perjury in giving testimony at a former trial, evidence of the clerk that there was no doubt that he administered the oath to the defendant on the former trial, and of the presiding judge that it was his best judgment that the usual oath was administered to him, is sufficient to go to the jury on the question whether his evidence was given under oath. *State v. Miller*..... 75
2. **PERJURY—EVIDENCE—SUFFICIENCY—WITNESSES—REFRESHING MEMORY.** In a prosecution for perjury in giving testimony, the testimony alleged to be false may be proved by the judge, who recalled it, and by the stenographer, who testified that his notes were correct and was allowed to refresh his memory therefrom. *State v. Miller* 75
3. **PERJURY—EVIDENCE—CORROBORATION—SUFFICIENCY.** In a prosecution for perjury, the requirement that there must be direct testimony of at least one credible witness directly contradictory to the defendant's oath, in addition to which there must be corroboration by another such witness or circumstances established by independent evi-

PERJURY—CONTINUED.

dence, the evidence of a witness contradicting defendant's oath, that he and a person convicted and sentenced for a prior offense are one and the same person, are sufficiently corroborated by the record of the judgment and sentence and prison records. *State v. Miller* 75

PERMIT:

Failure to secure permit to burn forest material, see **NEGLIGENCE**, 1, 2.

PERSONAL INJURIES:

See **NEGLIGENCE**, 3-7.

Inflicted by vicious bull, see **ANIMALS**.

To passenger, see **CARRIERS**, 9-12.

Damages for, see **DAMAGES**, 2-5.

Liability of wife for injuries from negligence of child in operating automobile owned as separate property, see **HUSBAND AND WIFE**, 14.

Accident insurance, see **INSURANCE**, 2.

To employee, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 7-13.

To person on or near railroad tracks, see **RAILROADS**, 2.

From defect in public dock maintained by county, see **WHARVES**.

PHYSICIANS AND SURGEONS:

1. **PHYSICIANS AND SURGEONS—PRACTICING MEDICINE—REGULATION—STATUTES—VALIDITY—EQUAL PROTECTION OF THE LAWS.** Rem. & Bal. Code, § 8400, requiring a state license for the practice of medicine and surgery, osteopathy, "or any other system or mode of treating the sick," includes, and warrants a conviction for, the treatment of the sick by the laying on of hands, with suggestions from the mind of the operator to the mind of the patient; hence does not deny the equal protection of the laws in failing to specifically mention such system, along with "medicine," "surgery," and "osteopathy." *State v. Pratt* 96
2. **SAME—PRACTICING MEDICINE—REGULATION—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 8405, providing that nothing in the chapter relating to licenses for practicing medicine and other modes of treating the sick shall apply to or regulate any kind of treatment by prayer, does not exclude from the operation of the chapter the practice of suggestive therapeutics, a system of treating the sick by the laying on of hands with suggestions from the mind of the operator to the mind of the patient; since the same is not any kind of treatment by prayer. *State v. Pratt*..... 96

PLACE:

Of execution and delivery of policy, see **INSURANCE**, 1.

PLEADING:

See **ESTOPPEL**, 3; **LIBEL AND SLANDER**, 2; **REPLEVIN**.

Review of pleadings as to venue of property in action of replevin, see **APPEAL AND ERROR**, 14.

Harmless error in rulings on, see **APPEAL AND ERROR**, 20, 21.

In action against members of fraternity for rent, see **ASSOCIATIONS**.

In action to prevent carrier from abandoning line, see **CARRIERS**, 3.

Effect of prayer for equitable relief in law action by creditor of insolvent corporation to recover on unpaid stock subscription, see **CORPORATIONS**, 5.

Statute of frauds, see **FRAUDS, STATUTE OF**, 4.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

Complaint in action for injunction, see **INJUNCTION**.

Waiver of plea of *res judicata*, see **JUDGMENT**, 4.

Amendment on change of venue from justice, see **JUSTICES OF THE PEACE**, 4.

In action for reduction of taxes, see **TAXATION**, 3.

Complaint by consumer for discrimination in water rates, see **WATERS AND WATER COURSES**, 2, 3.

1. **PLEADINGS—COMPLAINT—DEFINITENESS—BILL OF PARTICULARS.** A complaint for injuries sustained in a collision with an automobile is sufficiently definite and certain, and not subject to a demand for a bill of particulars, where it alleges the ultimate and issuable facts, charging that the defendants negligently lost control of the automobile, and carelessly approached a street crossing without giving warning or slackening their speed, and drove the automobile out of the traveled track, and negligently permitted it to collide with the plaintiff, due to the negligent manner of operation. *Switzer v. Sherwood* 19
2. **PLEADING—TENDER—ADMISSIONS.** A tender of a tax is admitted where a complaint alleges the tender and that it was wrongfully refused, and the answer admits the tender but denies that it was wrongfully refused, as the denial was of a mere conclusion and presents no issue. *Simpson Logging Co. v. Chehalis County* 245
3. **PLEADING—ADMISSIONS—NECESSITY OF PROOF.** Where the complaint in an action for damages against a city alleges that the necessary claim therefor was filed with the city, and was not denied by defendant, proof of such filing is unnecessary upon the trial. *Johanson v. Seattle* 527
4. **PLEADING—SPECIAL INTERROGATORIES.** It is proper to refuse to require an adverse party to answer special interrogatories, under Rem. & Bal. Code, § 1226, permitting the same when material to the defense of the action, where they were immaterial in that answers would in no wise tend to support any material allegation of the answer, or where the matters inquired about were as much within the

PLEADING—CONTINUED.

knowledge of the defendant as of the adverse party. *Brooke v. Boyd* 213

5. **PLEADINGS—JUDGMENT ON PLEADINGS—ANSWER—SUFFICIENCY.** In an action for a broker's commissions, judgment on the pleadings cannot be granted on the theory that affirmative defenses admitted the employment, where the defenses showed that the broker failed to perform his contract, and the answer denied that he rendered any services. *Metcalf v. Storey*..... 119

PLEDGES:

Validity of contract of pledge made in violation of statute, see **CONTRACTS**.

POLICE POWER:

Sunday closing of theaters as reasonable exercise of, see **CONSTITUTIONAL LAW**, 1.
Closing theaters on Sunday, see **SUNDAY**, 2, 3.

POLICY:

Of insurance, see **INSURANCE**.

POWERS:

Of commissioners to employ engineer as expert in preparing assessment roll for waterway district, see **CANALS**.
Of county commissioners to consent to abandonment of line, see **CARRIERS**, 2.
Of express company to renounce intrastate business, see **CARRIERS**, 5.
Of court to correct error in former rulings, see **COURTS**.
Of factor to sell goods for preexisting debt, see **FACTORS**.
Of justice to discharge jury in criminal case, see **JUSTICES OF THE PEACE**.

PRACTICE:

See **APPEAL AND ERROR**; **CERTIORARI**; **COSTS**; **CRIMINAL LAW**; **DAMAGES**; **DIVORCE**; **JUDGMENT**; **NEW TRIAL**; **PROHIBITION**; **TRIAL**.
Prosecution of actions in general, see **ACTION**.
Of medicine, license to, see **PHYSICIANS AND SURGEONS**.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 18-24.
Ground for estoppel, see **ESTOPPEL**, 2.

PREMISES:

Dangerous premises attractive to children, see **NEGLIGENCE**, 3, 5.

PREMIUMS:

Required by Industrial Insurance Act, see **MASTER AND SERVANT**, 7.

PRESUMPTIONS:

- From delay in prosecution of action, see ACTION, 2.
- As to regularity of proceedings to initiate condemnation by city, see EMINENT DOMAIN, 6.
- In civil actions, see EVIDENCE, 2.
- As to malice, see LIBEL AND SLANDER, 3.
- As to contributory negligence of child, see NEGLIGENCE, 6.
- As to performance of contract of sale, see SALES, 6.
- As to chaste character of female, see SEDUCTION, 1.

PRICE:

- Attempt to agree upon price of land as condition precedent to condemnation, see EMINENT DOMAIN, 5, 7.

PRINCIPAL AND ACCESSORY:

- See CRIMINAL LAW, 1, 8.

PRINCIPAL AND AGENT:

- See BROKERS; FACTORS.
- Ratification of sale of real estate by agent, see FRAUDS, STATUTE OF, 2.
- Consignment of goods for sale on commission, see SALES, 8.
- 1. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION. A landlord accepting the benefits of a lease made by its authorized agent in his own name, without questioning its validity, adopts the same as its own, where the principles of equitable estoppel intervene to prevent a denial of its validity for want of acknowledgment. *Matzger v. Arcade Building & Realty Co.*..... 401

PRINCIPAL AND SURETY:

- Contribution by stockholders as surety for corporation, see CORPORATIONS, 2.

PRINTING:

- Of arguments for or against initiative measures, cost of, see STATUTES, 5, 6.

PRIORITIES:

- Of mechanics' liens, see MECHANICS' LIENS, 2.

PRIVILEGED COMMUNICATIONS:

- Disclosure by witness, see WITNESSES, 2.

PROCESS:

- On appeal, see APPEAL AND ERROR, 8.

PROFITS:

- Division of under agreement for joint adventure, see JOINT ADVENTURES.

PROHIBITION:

1. **PROHIBITION—APPEAL—JURISDICTION — RIGHT TO DETERMINE.** Prohibition lies to prevent issuance of an execution upon a judgment pending appeal, about to be issued on the ground that notice of appeal was not given in time; since the supreme court alone has jurisdiction to determine the sufficiency of the appeal, under Rem. & Bal. Code, §§ 1731 and 1733, providing that, upon the taking of an appeal, the supreme court shall acquire jurisdiction for all necessary purposes and shall control the superior courts in all matters pertaining to the appeal, and may dismiss an appeal for want of jurisdiction or insufficiency of the notice or proceedings. *State ex rel. Merrill v. Superior Court*..... 109

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROPERTY:

Liability of abstractor for omissions in abstract of title to, see **ABSTRACTS OF TITLE**.

Allegations as to venue of in replevin, see **APPEAL AND ERROR**, 14.

Loss of goods, see **BAILMENT**.

Dedication to public use, see **DEDICATION**.

Taking or damaging for public use, see **EMINENT DOMAIN**.

Exempt property, see **EXEMPTIONS**.

Sale of by factor for preexisting debt, see **FACTORS**.

Subject to mechanics' lien, see **MECHANICS' LIENS**, 1.

Recovery of personal property, see **REPLEVIN**.

PROSTITUTION:

Abatement of disorderly house under "Red Light Law," see **NUISANCE**.

Taxation against property used for purpose of, on enjoining nuisance under "Red Light Law," see **TAXATION**, 1.

PROXIMATE CAUSE:

Of injury to passenger, see **CARRIERS**, 11.

PUBLICATION:

Of libel, see **LIBEL AND SLANDER**, 1, 2, 5.

Notice of proposed improvement, see **MUNICIPAL CORPORATIONS**, 3.

Of arguments for or against initiative measures, see **STATUTES**, 5, 6.

PUBLIC DEBT:

Limitations, see **MUNICIPAL CORPORATIONS**, 14.

PUBLIC IMPROVEMENTS:

By municipalities, see **MUNICIPAL CORPORATIONS**, 3-5.

PUBLIC POLICY:

- As invalidating exemption clause in free pass given as part consideration for services, see **CARRIERS**, 9.
- Validity of ordinance closing theaters on Sunday, see **SUNDAY**, 4.

PUBLIC SERVICE COMMISSION:

- Regulation of railroad rates, when order takes effect, see **CARRIERS**, 6.
- Jurisdiction of question of discrimination of rates by water company, see **WATERS AND WATER COURSES**, 1.

PUBLIC USE:

- Dedication of property, see **DEDICATION**.
- Taking property for public use, see **EMINENT DOMAIN**.

PUNISHMENT:

- See **CRIMINAL LAW**, 15, 16.

PUNITIVE DAMAGES:

- Right of recovery, see **DAMAGES**, 1.

QUESTION FOR JURY:

- Negligence of person injured by vicious bull, see **ANIMALS**, 2.
- Negligence in sudden starting of street car, see **CARRIERS**, 12.
- Cause of accidental injury, see **INSURANCE**, 2.
- Reason for discharge under contract of employment, see **MASTER AND SERVANT**, 11.
- In action for injury to servant, see **MASTER AND SERVANT**, 12.
- Negligence of person struck by automobile, see **MUNICIPAL CORPORATIONS**, 13.
- Negligence causing or contributing to accident at crossing, see **RAILROADS**, 2.
- In prosecution for seduction, see **SEDUCTION**, 4, 5.
- Negligence of county in maintaining public dock with loose fender-pile, see **WHARVES**, 2.

RAILROADS:

- Carriage of goods and passengers, see **CARRIERS**.
- Appropriation of property, see **EMINENT DOMAIN**, 14-19.
- As employers, see **MASTER AND SERVANT**, 10, 16.
- 1. **RAILROADS—OWNERSHIP OF STOCK IN COMPETING LINE—WHO MAY QUESTION.** A private citizen cannot raise the question whether a railroad corporation in owning all the stock of other companies violates Const., art. 12, § 16, prohibiting the consolidation of its stock, property or franchises with any other railroad owning a competing line, or Rem. & Bal. Code, § 8665, further prohibiting the owning of a competing line or any stock or interest in a company owning or operating a competing line; since the question should be left open for the state for such action as it deems wise. *Day v. Tacoma R. & Power Co.*..... 161

RAILROADS—CONTINUED.

2. **RAILROADS—NEGLIGENCE—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** The negligence of a motorman of an interurban train in colliding with a load of wood at a private farm crossing, and the contributory negligence of the driver of the team, are questions for the jury, where there was evidence that the train was running at the rate of fifty miles an hour when the motorman first saw the horses coming into view up a steep grade, about ten feet distant from the track, he being able to see the team before the driver could see the train, that, before reaching the foot of the grade, the driver went ahead, and with a view of the track for about 2,500 feet, could not see or hear any train, and at once started to rush the team across, and looking a second time, when his horses had about crossed, saw a car approaching from five to six hundred feet away, that the train caught the rear wheels of the wagon and stopped after running about 300 feet, and could have been brought to a stop within 800 to 1,000 feet if running at 50 miles per hour. *Aurelio v. Puget Sound Elec. R.*..... 480

RATE:

- Regulation of, by public service commission, see **CARRIERS**, 6.
For premiums payable to state under Industrial Insurance Act, see **MASTER AND SERVANT**, 7.
Discrimination in rates by water company, see **WATERS AND WATER COURSES**.

RATIFICATION:

- Of sale of real estate by agent, see **FRAUDS, STATUTE OF**, 2.
Of act of agent, see **PRINCIPAL AND AGENT**.

REAL ESTATE AGENTS:

- See **BROKERS**.

RECALL:

- Of city officers, see **MUNICIPAL CORPORATIONS**, 2.

RECITALS:

- Presumptions as to recitals in judgment, see **EVIDENCE**, 2.

RECORDS:

- On appeal, see **APPEAL AND ERROR**, 9-12; **CRIMINAL LAW**, 11.

REDUCTION:

- Of excessive tax, see **TAXATION**, 2-6.

REGULATION:

- Of rates by public service commission, see **CARRIERS**, 6.
Excise tax as regulation of interstate commerce by state, see **COMMERCE**.

REGULATION—CONTINUED.

- Of business as exercise of police power, see CONSTITUTIONAL LAW, 1.
- Of means of taking game fish, see FISH.
- Practice of medicine, see PHYSICIANS AND SURGEONS.
- Of theaters, see SUNDAY.

REJECTION:

- Of offered articles of incorporation, for similarity of name, see CORPORATIONS, 1.

REMAINDERS:

- Created by will, see WILLS.

REMISSION:

- Of excessive damages, see DAMAGES, 5.

REMOVAL:

- Of lateral support, see EMINENT DOMAIN, 13.
- Of lateral support, claim for damages, see MUNICIPAL CORPORATIONS, 17, 18.

RENT:

- Liability of members of fraternity for, see ASSOCIATIONS.

REOPENING CASE:

- For newly discovered evidence, see CRIMINAL LAW, 7.

REPEAL:

- Of law relating to use of nets for taking fish, see FISH.

REPLEVIN:

- Necessity of allegations as to venue of property, see APPEAL AND ERROR, 14.
 - Garnishment pending suit, stay of judgment or execution, see GARNISHMENT.
1. **REPLEVIN—DEMAND—NECESSITY—PLEADING AND PROOF.** A nonsuit in replevin should not be granted for failure to allege a demand, where the demand was proved; nor for failure to prove a demand upon a defendant claiming the right of possession as owner. *Armour v. Seizas*..... 181
 2. **REPLEVIN—VALUE OF PROPERTY.** A finding of the value of the property is essential to sustain a judgment of replevin. *Armour v. Seizas* 181
 3. **REPLEVIN—VALUE OF PROPERTY—EVIDENCE.** In replevin, an admission of the value of the property, an automobile, several months before it was taken, is not evidence of the value at the time of the taking. *Armour v. Seizas*..... 181
 4. **SAME—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY.** In replevin, a finding of the value of the property is not supported by the uncon-

REPLEVIN—CONTINUED.

troverted affidavit for the writ alleging the value of the property at the time of the taking, where neither the affidavit nor the writ was served on the defendants, and the same value alleged in the complaint was denied in the answer. *Armour v. Selzas*..... 181

REQUESTS:

For instructions, see **TRIAL**, 4.

RESCISSION:

Of contract of sale, see **SALES**, 3.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 2.

RES GESTAE:

In civil actions, see **EVIDENCE**, 3.

RESIDENCE:

Statement of residence of claimant in claim against city for damages, see **MUNICIPAL CORPORATIONS**, 20, 21.

RES JUDICATA:

See **JUDGMENT**, 2-4.

REVENUE:

See **TAXATION**.

REVERSIONS:

Lease of terminals condemned for railroad purposes as working reversion of property, see **EMINENT DOMAIN**, 14-16.

REVIEW:

See **APPEAL AND ERROR**; **CERTIORARI**.

In criminal prosecution, see **CRIMINAL LAW**, 3, 9, 14.

Of discretion of industrial insurance commission in allowing award to injured workman, see **MASTER AND SERVANT**, 9.

REVOCATION:

Of dedication, see **DEDICATION**, 2.

ROADS:

See **HIGHWAYS**.

Streets in cities, see **MUNICIPAL CORPORATIONS**, 5-13.

RULE OF DECISIONS:

See **COMMON LAW**.

SALES:

By factors, see **FACTORS**.

Fraud inducing sale, see **FRAUD**, 2.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 1, 2,

By hawkers or peddlers, see **HAWKERS AND PEDDLERS**.

SALES—CONTINUED.

Of personal property on abatement of house of prostitution under "Red Light Law," see NUISANCE, 1.

By trustee, see TRUSTS.

Of realty, see VENDOR AND PURCHASER.

1. **SALES—CONTRACTS—CONSTRUCTION.** A contract whereby one party agrees to furnish the other all the cedar logs cut by it in a specified township upon lands now owned or hereafter purchased, as such cedar logs are reached by it in its logging operations, and to deliver the logs cut to the second party at its shingle mill to be erected and located adjacent to the first party's railroad track, and the second party agrees to purchase of the first party all the cedar logs cut by it from said township as cut and delivered at said mill, and pay for same at the rate of \$5.50 per thousand feet B. M., but the price to be adjusted from time to time according to the Tacoma market, and to be at all times \$1.50 per thousand feet B. M., less than the Tacoma market price, the agreement to be in force for a period of ten years from its date, constitutes a mutual contract of sale. *Kanaskat Lumber & Shingle Co. v. Cascade Timber Co.*..... 561
2. **SAME—CONSTRUCTION BY PARTIES.** Under such a contract, where the logs supplied varied from year to year in amount, and the delivery, whether greater or less, was accepted without question, the fact that the second party erected a shingle mill for the purpose of manufacturing the logs, and that both parties had mutually performed their agreements for a period of six years, could not be construed as a construction of the contract by the parties to the effect that the first party was bound to keep the second party's mill in operation for the period named in the contract. *Kanaskat Lumber & Shingle Co. v. Cascade Timber Co.*..... 561
3. **SALES—RESCISSION—BY PURCHASER.** There can be no rescission by the purchaser of an automobile, seeking to recover the purchase price because of fraud in the sale, where it was badly damaged while in his possession, so that the parties cannot be placed in *statu quo*. *Burnley v. Shinn* 240
4. **SALES—DELIVERY—EVIDENCE—SUFFICIENCY.** Upon an issue as to the delivery of lumber sold, evidence of a witness that he knew the lumber sold had been delivered, although he did not see it delivered, is sufficient to make a *prima facie* case, in the absence of other evidence. *Remley v. Swanson*..... 449
5. **SALES—DELIVERY—WHEN TITLE PASSES—"F. O. B. SCOW."** Delivery of 5,000 herring boxes pursuant to the terms of sale, "f. o. b. scow" at Seattle, "alongside of the barge L." operates *ipso facto* to pass the title to the purchaser, who thereafter assumes the risk of loss, if the articles corresponded to the terms of the contract and there was no stipulation making inspection a condition precedent. *Skinner v. Griffiths & Sons*..... 291

SALES—CONTINUED.

6. **SALES—WARRANTY—PERFORMANCE—EVIDENCE—SUFFICIENCY.** Where part of 5,000 herring boxes were lost from a scow, and substantially half were recovered and found to conform to the terms of the contract of sale, the presumption is that all the boxes lost were of the same kind, and conformed to the contract. *Skinner v. Griffiths & Sons* 291
7. **SALES—WARRANTY—DAMAGES—MEASURE.** There can be no recovery of damages for breach of warranty of an automobile, in the absence of evidence showing its market or reasonable value. *Burnley v. Shinn* 240
8. **SALES—CONDITIONAL SALES—CONSIGNMENT TO AGENT.** Where pianos were consigned to agents to be sold at stated prices, and returns made on sales in cash or approved notes of the purchasers secured on the instruments sold, and goods not sold within 90 days to be subject to the principal's orders, the transaction was a consignment for sale upon commissions, and not a conditional sale, within Rem. & Bal. Code, § 3670, requiring conditional sales to be filed for record. *Eilers Music House v. Fairbanks* 379

SEDUCTION:

See CRIMINAL LAW, 6, 7, 10.

1. **SEDUCTION—PREVIOUS CHASTE CHARACTER—PRESUMPTIONS—INSTRUCTIONS.** In a prosecution for seduction, an instruction to the jury that every female person is presumed to be of chaste character and that the burden rests upon the person calling it in question to show, by a fair preponderance of the evidence, that, at the time in question, she was physically unchaste, is not erroneous on the ground that it overthrows the defendant's presumption of innocence by the counter presumption of womanly chastity. *State v. Jones* 588
2. **SAME—EVIDENCE—CONTINUANCE OF RELATIONS—ADMISSIBILITY.** In a prosecution for seduction under promise of marriage, evidence is admissible showing that the parties kept company with each other for about six months after the seduction, as bearing on the question of consent obtained by promises. *State v. Jones* 588
3. **SAME—EVIDENCE—SUBSEQUENT UNCHASTITY—ADMISSIBILITY.** Evidence of a specific unchaste act of the prosecuting witness committed with a man other than accused subsequent to the alleged seduction is inadmissible as proof of unchastity, on the ground that such unchaste act may have resulted from the breaking down of maidenly modesty by the original act of seduction by the accused. *State v. Jones* 588
4. **SEDUCTION—CORROBORATION—EVIDENCE—ADMISSIBILITY.** In a prosecution for seduction under promise of marriage, which, by the terms of Rem. & Bal. Code, § 2443, required corroborative evidence, testimony that the parties kept almost constant company with each

SEDUCTION—CONTINUED.

other, to the exclusion of every one else, both before and immediately after the time of the alleged promise, is admissible, and its weight presents a question for the jury. *State v. Jones*..... 588

5. **SAME—CORROBORATION—ATTEMPT TO PROCURE ABORTION—QUESTION FOR JURY.** In a prosecution for seduction under promise of marriage, evidence of an effort to secure an abortion on the part of the accused is corroborative of the promise of marriage, and the sufficiency of evidence tending to show that fact is for the jury. *State v. Jones* 588

SENTENCE:

In criminal prosecutions, see **CRIMINAL LAW**, 15, 16.

SEPARATE ESTATE:

Of spouse, see **HUSBAND AND WIFE**.

SETTLEMENT:

By guardian, see **GUARDIAN AND WARD**.

SLANDER:

See **LIBEL AND SLANDER**.

SOCIETIES:

See **ASSOCIATIONS**.

SOLICITATION:

Of sale of goods by sample, see **HAWKERS AND PEDDLERS**.

SPECIAL DEPOSITS:

See **BANKS AND BANKING**.

SPLASH DAMS:

As dangerous agency requiring warning of release of waters, see **NEGLIGENCE**, 4.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 9;
CRIMINAL LAW, 11.

STATES:

Unlawful taking of oysters from state reserve lands, see **LARCENY**.

1. **STATES—CONTRACT—HIGHWAY CONTRACT—EXTRA WORK—LIABILITY.** Under a state contract for road construction, entered into with the state highway board, providing that no extra work not included in the specifications or covered in the contract shall be paid for unless done pursuant to the highway commissioner's written direction, after the price therefor shall be agreed upon, the contractor cannot recover for extra work which was merely alleged in his com-

STATES—CONTINUED.

plaint to be required by the state, acting by and through its engineer in charge; the inference being that the extra work was verbally required by the engineer, who had no power to contract on the part of the state. *Ambaum v. State*..... 122

STATUTES:

See INTOXICATING LIQUORS; MANDAMUS; TAXATION, 1.

Validity of contracts made in violation of statute, see CONTRACTS.

Authority of administrator *de bonis non* to maintain action against former executor for conversion, see EXECUTORS AND ADMINISTRATORS, 3.

Exemption of property, see EXEMPTIONS.

Repeal of law permitting use of nets for taking of fish, see FISH.

Statute of frauds, see FRAUDS, STATUTE OF.

Relating to malicious slander, see LIBEL AND SLANDER, 3, 4.

Age of consent to marry, see MARRIAGE.

Industrial insurance act, see MASTER AND SERVANT, 1-3.

Public improvements, see MUNICIPAL CORPORATIONS, 3.

Requiring certificate as to assumed name in conducting business, see NAMES.

Requiring permit from fire warden to burn forest material, application, see NEGLIGENCE, 1.

Licensing of physicians, see PHYSICIANS AND SURGEONS.

Sunday closing of theaters, see SUNDAY.

Testimony as to transactions with deceased, see WITNESSES, 1.

1. STATUTES—SUBJECTS AND TITLES. The determination of what acts shall be prohibited as detrimental to the protection of game fish, and making the use of nets in fresh waters a nuisance, is within the purview of the title of the game code of 1913, Laws 1913, p. 356, defined, in part, as an act for the protection of game fish. *State v. Allen* 83
2. STATUTES—TITLE AND SUBJECTS—AMENDMENTS. The law of 1907, Rem. & Bal. Code, § 703, amending the act relating to wage exemptions from garnishment, is not unconstitutional in that it fails to refer in its title to, or set forth at length, *Id.*, § 563, subd. 4, being part of the general exemption law, exempting specified property from sale on execution and attachment; since the acts in nowise conflict or relate to the same subject-matter. *Creditors Collection Association v. Bisbee*..... 358
3. STATUTES—CONSTRUCTION—DEPARTMENTAL CONSTRUCTION. The departmental interpretation of the industrial insurance commission law, under advice of the attorney general, while entitled to weight, is not binding on the courts where the law was not uncertain or obscure. *Wendt v. Industrial Insurance Commission*..... 111
4. STATUTES—CONSTRUCTION—ENROLLED BILL. In case of a conflict between the printed laws and an enrolled bill on file in the office of

STATUTES—CONTINUED.

the secretary of state, the latter controls. *State ex rel. Chamberlain v. Howell*..... 692

5. **STATUTES—INITIATIVE MEASURES — PUBLICITY — COST OF PRINTING ARGUMENTS—STATUTES—CONSTRUCTION.** Upon proposing an initiative measure to be substituted to the people, the persons filing with the secretary of state an argument in support of the same to be printed in the state pamphlet, must, on demand by the secretary of state, deposit sufficient money to cover the increased cost of "paper for, and the printing and binding of, such argument," under 3 Rem. & Bal. Code, § 4971-26, expressly so providing, and Id., § 4971-27 providing that the cost of printing the pamphlets shall be paid from the money appropriated for printing for the secretary of state, provided: that the increased cost for such arguments shall be paid from the moneys deposited to cover the same, the balance thereof to be returned to the depositors. *State ex rel. Chamberlain v. Howell* 692
6. **SAME—COST OF PRINTING ARGUMENTS—STATUTES — CONSTITUTIONALITY.** 3 Rem. & Bal. Code, §§ 4971-26, 4971-27, are not invalid for the reason that they require the persons filing arguments for or against initiative measures to deposit sufficient money with the secretary of state to cover the cost of paper for, and the printing and binding of, such argument; since the requirement is not an unreasonable one, and Const., art. 2, § 1, directing the legislature to provide methods of publicity of all laws and amendments to the constitution referred to the people with arguments for and against the same, does not prohibit the legislature from requiring a fee in such case. *State ex rel. Chamberlain v. Howell*..... 692

STAY:

Of judgment or execution on garnisheeing defendant pending suit of replevin, see GARNISHMENT.

STOCK:

Corporate stock, see CORPORATIONS, 2, 4, 5.

Ownership of stock in competing line, see RAILROADS, 1.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 2, 4, 5.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS, 5-13.

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 4, 5.

SUNDAY:

1. **SUNDAY—REGULATION OF THEATERS—STATUTES—AUTHORITY OF CITY.** An ordinance of a city of the third class prohibiting the keeping open of theaters on Sunday is not inconsistent or in conflict with Rem. & Bal. Code, § 2494, making it unlawful to disturb the peace of Sunday by noisy sports or unnecessary labor, or Id., § 2499, prohibiting shows, plays and boisterous amusements that wilfully disturb religious assemblages; since nothing in those, or any other acts, expressly permit playhouses to keep open on Sunday. *In re Ferguson* 102
2. **SUNDAY—REGULATION OF THEATERS—POLICE POWER OF CITY.** Under Const., art. 11, § 11, vesting in cities the power to make reasonable police regulations within their limits, and Rem. & Bal. Code, § 7685, subd. 21, authorizing cities of the third class to enforce within their limits, police regulations not in conflict with general laws, such a city has authority under its police power to prohibit the opening of theaters on Sunday, in the absence of any general law expressly permitting them to be opened. *In re Ferguson*.... 102
3. **SAME.** The prohibition of opening theaters on Sunday is a regulation, and not a prohibition, of theaters, and hence is a valid exercise of the police power, even if the city is merely authorized to license theaters for the purpose of regulation and revenue. *In re Ferguson* 102
4. **SUNDAY—REGULATION OF THEATERS—PUBLIC POLICY—STATUTES—CONSTRUCTION.** The repeal of a statute prohibiting the opening of theaters on Sunday, and the enactment of statutes prohibiting noisy amusements and disturbances of religious assemblages, impliedly permitted the opening of theaters on Sunday; but was not a declaration of the policy of the state against the closing of theaters on Sunday; hence an ordinance closing them, under the police power of a city, is not void, as against the policy of the state. *In re Ferguson* 102

SUPERSEDEAS:

Pending appeal from judgment in condemnation proceeding, see **EMINENT DOMAIN**, 11.

SURPRISE:

Ground for new trial, see **NEW TRIAL**, 6.

TAXATION:

Of costs, review of error as dependent on objections in lower court, see **APPEAL AND ERROR**, 3.

As interference with interstate commerce, see **COMMERCE**.

Against property under "Red Light Law" as taking without due process of law, see **CONSTITUTIONAL LAW**, 2.

Assessment of tax against property on abatement of nuisance under "Red Light Law," see **NUISANCE**, 2.

Admission in pleading as to tender of tax, see **PLEADING**, 2.

TAXATION—CONTINUED.

1. **TAXATION—UNIFORMITY—CHARGE ON BUSINESS—NUISANCES.** 3
Rem. & Bal. Code, § 946-8, providing that in prosecutions under the "Red Light Law" whenever a permanent injunction issues, a tax of \$300 shall be assessed against the building and grounds and against the owners, does not offend against the constitutional provisions providing for uniformity and equality of taxation, since the tax is upon the traffic or business and applies to all persons offending against its provisions. *State ex rel. Kern v. Jerome*..... 261
2. **TAXATION—ASSESSMENT—EQUALIZATION—REVIEW.** The acts of the board of equalization being of a quasi judicial nature, its findings will not be disturbed in the absence of a showing of fraud, or that its action was arbitrary or capricious. *Simpson Logging Co. v. Chehalis County* 245
3. **TAXATION—ASSESSMENTS—EXCESSIVENESS—COMPLAINT—SUFFICIENCY.** A complaint to secure a reduction of taxes upon city property, alleging that the same was assessed more proportionately than other business property upon another street, is insufficient where it does not allege that the valuation is in excess of the reasonable cash value of the property, nor that the same is assessed more than like property in the immediate vicinity upon the same street. *Collins v. King County* 251
4. **TAXATION—REDUCTION OF TAX—FRAUD.** There is no such disparity between the actual and assessed value of property as to give a right to a reduction of taxes on the ground of fraud, where appellant alleged the value fixed by the assessor to be \$33,712, but that the actual value did not exceed \$30,000; since the courts will not interfere to correct errors in judgment as to valuation, in the absence of evidence of fraud. *Collins v. King County*..... 251
5. **TAXATION—ASSESSMENT—EXCESSIVENESS—CONSTRUCTION—FRAUD.** Where a county cruise of timber for the purpose of assessment was unsatisfactory, and upon objection to the board of equalization, a new cruise was agreed upon and made by a cruiser selected by the county, showing one-fourth less timber than the first cruise, the assessment of the timber upon the basis of the first cruise is constructively fraudulent, when taken in connection with the surrounding circumstances. *Simpson Logging Co. v. Chehalis County*.
..... 245
6. **SAME.** Where the valuation of property adopted by the board of equalization for the purposes of taxation is so grossly excessive as to constitute actual fraud, the court has jurisdiction to review the assessment in a proper proceeding. *Simpson Logging Co. v. Chehalis County* 245

TELEGRAPHS AND TELEPHONES:

1. **TELEGRAPHS AND TELEPHONES—DELAY IN TRANSMISSION OF MESSAGES—DAMAGES—MENTAL SUFFERING.** Mental suffering, resulting from the negligence of a telegraph company in the delivery of a telegram entrusted to it, is not ground for the allowance of damages, in the absence of statute providing therefor, as it is governed by the common law doctrine, and does not involve its application to new conditions, not being different in principle from cases of negligent delay in conveying messages from one person to another resulting in mental suffering arising before the invention of the telegraph. *Corcoran v. Postal Telegraph-Cable Co.*..... 570
2. **SAME—DELAY IN TRANSMISSION OF MESSAGES—DAMAGES.** The award of damages in the sum of the price paid by plaintiff for the transmission of a message, which was delayed in delivery by the negligence of defendant, is not a damage so connected with plaintiff's mental suffering as to warrant the enhancement of the award by the attendant mental suffering occasioned. *Corcoran v. Postal Telegraph-Cable Co.* 570

TENDER:

Admissions in pleading as to tender of tax, see **PLEADING**, 2.

TERMINATION:

Incorporation of parties as termination of prior existing contract, see **CORPORATIONS**, 3.

Of guardianship, see **INSANE PERSONS**, 1.

Of contract, see **JOINT ADVENTURES**, 3.

Of lease, time to exercise option, see **LANDLORD AND TENANT**.

Of testamentary trust, see **WILLS**.

THEATERS AND SHOWS:

Sunday closing of theaters as reasonable exercise of police power, see **CONSTITUTIONAL LAW**, 1.

Closing theaters on Sunday, see **SUNDAY**.

TIME:

For filing abstract of record on appeal, see **APPEAL AND ERROR**, 11.

Of taking effect of order of public service commission fixing railroad rates, see **CARRIERS**, 6.

When lien of assessment attaches against property, see **COVENANTS**.

Reasonable time for deliberation by jury, see **JUSTICES OF THE PEACE**, 3.

For exercise of option to terminate lease, see **LANDLORD AND TENANT**.

TITLE:

See **ABSTRACTS OF TITLE**.

Power of factor to pass title to goods in consideration of preexisting debt, see **FACTORS**.

To lands under water, conveyance by grantor, see **NAVIGABLE WATERS**.

Delivery as passing title to goods, see **SALES**, 5.

Statutes, see **STATUTES**, 1, 2.

TORTS:

See **EXPLOSIVES; FRAUD; LIBEL AND SLANDER; NEGLIGENCE; NUISANCE.**
 Measure of damages, see **DAMAGES, 2-5.**
 Married women, see **HUSBAND AND WIFE, 1.**
 Of employers, see **MASTER AND SERVANT.**
 Negligence in delivery of telegram, see **TELEGRAPHS AND TELEPHONES.**

TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR, 9-12; CRIMINAL LAW, 11.**

TRESPASSERS:

Child as trespasser on public dock, see **NEGLIGENCE, 5.**

TRIAL:

See **NEW TRIAL.**
 Prosecution of action, see **ACTION, 2.**
 Exceptions or objections for purpose of review, see **APPEAL AND ERROR, 3-6.**
 Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR, 9-12.**
 Review of verdicts, see **APPEAL AND ERROR, 17.**
 Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR, 18-24.**
 Of criminal prosecution, see **CRIMINAL LAW.**
 Instructions in action against city for removal of lateral support, see **EMINENT DOMAIN, 13.**
 Instructions in action to declare reversion of easement, see **EMINENT DOMAIN, 19.**

1. **TRIAL—MISCONDUCT OF JUDGE—COMMENT ON FACTS—REVIEW—HARMLESS ERROR.** An introductory statement in the instructions to the jury that the action was "to recover damages suffered by the plaintiff by reason of breach of covenant," is not prejudicially erroneous as a comment on the facts. *Munson v. Johnson*..... 628
2. **TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE.** An instruction that an ordinance of a city limited the speed of automobiles on city streets, except at street crossings, where the laws of the state fixed the maximum rate of speed, and that if the defendant was found to have violated the law in this respect the verdict should be for plaintiff, is not objectionable as a comment on the evidence in that the ordinance limiting the rate of speed made no exception at street crossings, since the ordinance must be construed in connection with the state law. *Anderson v. Kinnear*..... 638
3. **SAME—ASSUMPTION AS TO FACTS.** An instruction is not faulty in that it assumes that an automobile was traveling along a certain street in the city of T., where there was no pleading or proof that the collision occurred in such city, when it was assumed at the trial

TRIAL—CONTINUED.

that the street was in the city of T., the case was tried there, and the jury was sent to view the place of the accident. *Anderson v. Kinnear* 638

4. **TRIAL—INSTRUCTIONS—REQUESTS.** It is not error to refuse an instruction defining contributory negligence, where the same was, in substance, given by the court in other instructions. *Anderson v. Kinnear* 638

TROVER AND CONVERSION:

Conversion of rents and profits by former executor, see **EXECUTORS AND ADMINISTRATORS**, 1, 3.

TRUSTS:

Creation by will, see **WILLS**.

1. **TRUSTS—SALES OF TRUST ESTATE—RIGHTS OF PURCHASER—NOTICE—CAVEAT EMPTOR.** Where a trustee for creditors sold a lot belonging to the trust estate, for the sum of \$4,750, agreeing with the purchaser to satisfy an existing mortgage for \$4,000 which was a lien upon the lot and other property, the purchasers giving back a purchase money mortgage in reliance upon the representations that the prior mortgage would be paid, neither the trustee nor a holder of such purchase money mortgage with notice can foreclose the same without first extinguishing and satisfying the prior lien, on the theory that the purchaser bought at his peril; since the doctrine of *caveat emptor* in judicial sales has no application where the sale was made for the purpose of satisfying the lien with which the property was burdened. *Barker v. Pfund*..... 143

UNIFORMITY:

Of taxation, see **TAXATION**, 1.

VACATION:

See **JUDGMENT**, 1.

Deed as rededication of vacated streets, see **DEDICATION**, 2.

Decree of distribution of decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

Of highways, see **HIGHWAYS**.

VALUE:

Of property, see **REPLEVIN**, 2-4.

VENDOR AND PURCHASER:

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 1, 2.

Conveyance of title to lands under water, see **NAVIGABLE WATERS**.

Transfer of ownership of personal property, see **SALES**.

Sales by trustee, see **TRUSTS**.

VENDOR AND PURCHASER—CONTINUED.

1. **VENDOR AND PURCHASER—MISREPRESENTATIONS—MATERIALITY.** Misrepresentations by the vendor of land do not warrant a rescission by the purchaser, where, if intended as such, they were concerning an immaterial matter and without prejudice to the purchaser. *Crockett v. Neely & Young* 657
2. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—RECOVERY OF PRICE—FRAUD—EVIDENCE—SUFFICIENCY.** Findings that a purchase of land was not induced by the fraudulent representations of the vendor as to its situation as sheltered from winds, its fertility and its suitability for growing vegetables and fruit by means of irrigation, and the character of a spring, etc., including the false use of a photograph of a man on his knees purporting to be standing in a field of alfalfa, are supported, where the testimony, although conflicting, fully sustained the truth of all the representations, the vendee had visited and personally inspected the land, which had been since resold at a large advance to a second purchaser, who was satisfied and successfully applying the land to the purposes for which it was originally sold, and the vendor was not aware of the deceptive use of the photograph of the alfalfa field, the raising of alfalfa being, in any event, outside the purpose of the vendee, and an immaterial matter. *Crockett v. Neely & Young*..... 657
3. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.** Subsequent purchasers of portions of a tract conveyed to their common grantor are not bound to take notice of his improvements and inclosures as indicating an error in the description in the deeds, where his fences only partially inclosed the land; but they are *bona fide* purchasers where they bought with reference to the description contained in the deeds as they appeared on the public records, under Rem. & Bal. Code, § 8771, providing that *bona fide* purchasers take the full legal record title from grantors holding the same. *McIver v. Hilstad*..... 206
4. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—RIGHTS.** The rights of a subsequent purchaser derailing title from a prior grantor and claiming under intermediate conveyances are measured by the language used in the deeds, and not controlled by facts and circumstances surrounding the conveyance passing from such prior grantor to his grantees. *Wardell v. Commercial Waterway District No. 1.* 495

VENUE:

- Review of error in failing to allege venue of property in action for replevin, see **APPEAL AND ERROR**, 14.
- In justices' courts, see **JUSTICES OF THE PEACE**, 4.

VERDICT:

- Review on appeal, see **APPEAL AND ERROR**, 17.
- Inadequate or excessive damages, see **DAMAGES**, 3-5.

VOTES:

Trading votes in council as malfeasance in office, see **MUNICIPAL CORPORATIONS**, 2.

WAIVER:

See **ESTOPPEL**.

Of contract rights by employee by acceptance of free pass, see **CARRIERS**, 10.

Of objections to condemnation proceeding, see **EMINENT DOMAIN**, 7.

Of bar of statute, see **FRAUDS, STATUTE OF**, 3.

Of plea of *res judicata*, see **JUDGMENT**, 4.

Of right to exercise election to terminate lease, see **LANDLORD AND TENANT**.

WARDS:

See **GUARDIAN AND WARD**.

WARNING:

Duty to warn of release of splash dam, see **NEGLIGENCE**, 4.

WARRANTY:

On sale of goods, see **SALES**, 6, 7.

WATERS AND WATER COURSES:

See **NAVIGABLE WATERS**.

Establishment of waterway district, see **CANALS**.

1. **WATERS AND WATER COURSES—WATER COMPANIES—RATES—DISCRIMINATION—PUBLIC SERVICE COMMISSION—JURISDICTION.** The public service commission is invested with exclusive jurisdiction, under the public utilities act (3 Rem. & Bal. Code, § 8626-1 *et seq.*), to pass upon and determine the question of a discrimination of rates charged by a water company. *State ex rel. Goss v. Metakne Falls Light & Water Co.* 652
2. **WATERS AND WATER COURSES—WATER COMPANIES—RATES—DISCRIMINATION—COMPLAINT.** A consumer, discriminated against by a water company in the matter of rates charged for water, has authority to file a complaint with the public service commission, under § 80 of the public utilities act, 3 Rem. & Bal. Code, § 8626-80, providing that "complaint may be made . . . by any person . . . in writing, setting forth any act or thing done or omitted to be done by any public service corporation," etc.; notwithstanding the proviso in § 80 that "no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any . . . water company, . . . unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such . . . water" etc., the proviso pertaining only

WATERS AND WATER COURSES—CONTINUED.

to complaints affecting the reasonableness of the schedule of rates or charges of a public service corporation, and not abridging the authority of an individual to complain of a discrimination in rates. *State ex rel. Goss v. Metairie Falls Light & Water Co.*..... 652

3. SAME. The party discriminated against, must, in any event, before resort to the courts, ask the public service commission itself to file the complaint, or apply to the city authorities to do so, or endeavor to induce other consumers to join in filing the complaint. *State ex rel. Goss v. Metairie Falls Light & Water Co.*..... 652

WHARVES:

1. WHARVES—PUBLIC DOCKS — MAINTENANCE — LIABILITY OF COUNTY. A county is bound to exercise the same degree of care for the safety of the public in the maintenance of a public dock at the termination of a county road as is required in the case of public highways; especially in view of the statute authorizing the maintenance of county docks only at the termination of county roads. *Gregg v. King County* 196
2. WHARVES—PUBLIC DOCK—CONSTRUCTION— NEGLIGENCE — LIABILITY OF COUNTY—QUESTIONS FOR JURY. The negligence of a county in maintaining a public dock with a loose fender-plate, whereby a child's hand was caught and crushed, is for the jury, where experts testified that the proper and safe construction was to have the fender-plates bolted to the dock, it being admitted that this would have prevented the injury. *Gregg v. King County*..... 196

WILLS:

1. WILLS—CONSTRUCTION—TESTAMENTARY TRUST OF INCOME—TERMINATION—RIGHT TO REMAINDER. A will devising all a testator's estate in undivided halves to his son and daughter, share and share alike, subject to a trust disposing of the total income of all his real estate for the use and benefit of a specified minor child of his son and a specified minor child of his daughter equally, to be paid by the executor to the respective guardians of said minor children, share and share alike, the trust to terminate upon the attainment of the age of majority by the younger legatee or upon the death of both legatees before either attains the age of majority, and providing that, in the event of the death of his son's child before becoming of age, the other trust legatee should continue to receive his undivided one-half until the age of majority, without any provision being made as to the deceased legatee's share of the income, plainly shows the intent of the testator to create a trust for particular individuals and not for the benefit of two classes of persons, and consequently the trust as to the deceased child would lapse, and her share of the income vest in the devisees, and not survive to her father. *Denton v. Schneider* 506

